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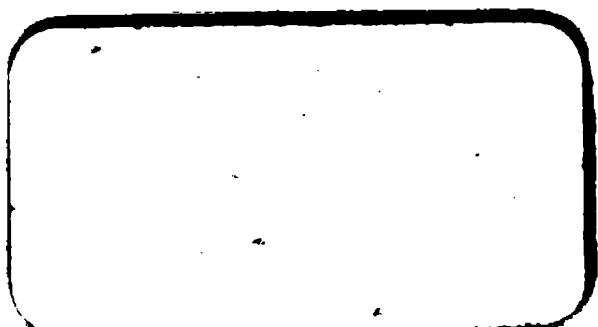
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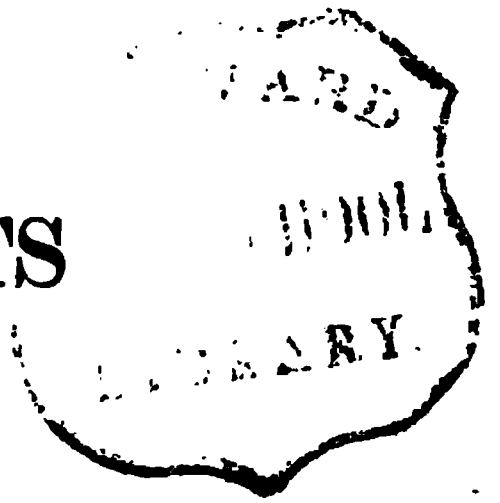
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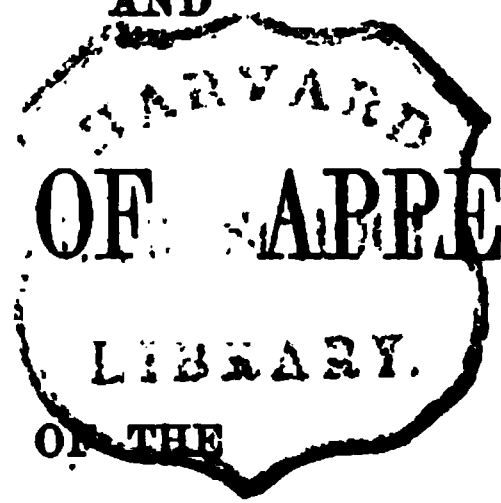


PRACTICE REPORTS

IN THE

SUPREME COURT,

AND



COURT OF APPEALS,

OF THE

STATE OF NEW YORK.

**BY NATHAN HOWARD, JR.,
COUNSELLOR-AT-LAW, NEW YORK.**



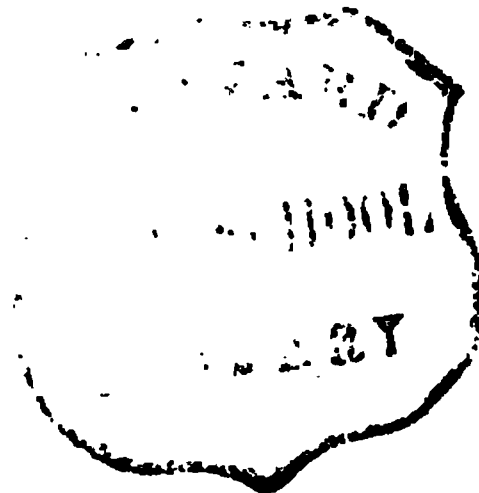
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PRACTICE REPORTS.

SUPREME COURT.

ISAAC HEATH agt. WALTER BARMOUR.

Where the plaintiff brings an action in a justice's court, and complains that the defendant wrongfully broke and entered his *close*, and then and there, at the times named, committed certain trespasses and did certain acts, and the defendant justifies *all the acts complained of*, on the ground that the *locus in quo* was at the time a public highway, &c., the justice should dismiss the action upon the question of *title*.

But if the plaintiff, on continuing the action in the supreme court, recovers a verdict for any sum, for trespasses committed *outside of the alleged highway*, he is entitled to *costs*, although the defendant succeeds in justifying all his acts committed upon said highway. (*This agrees with Hall agt. Hodskins, 30 How. 15.*)

Chautauqua Special Term, January, 1868.

MOTION by plaintiff, by way of appeal from adjustment of costs by the clerk of Chautauqua county. The original action was in a justice's court. The plaintiff alleges in his complaint that the defendant wrongfully and unlawfully broke and entered the plaintiff's close, in the town of Gerry, in the county of Chautauqua, on or about the months of May, June, July, August and September, in the year 1862; also in the months of April, &c., 1863, and so as to 1864, 1865 and 1866; and the defendant, during each and all of the said months and years, being wrongfully and unlawfully upon the premises of the said plaintiff, in the town of Gerry, in the county of Chautauqua, did then and there, by himself, his agents and servants, with teams, horses, oxen, wagons, plows and scrapers, wrongfully and unlawfully excavate the said premises of the plaintiff, and did then and there wrongfully and unlawfully cut timber of the plaintiff, upon his premises aforesaid, and destroy crops then and there growing, pull

Heath agt. Barmour.

down and destroy fences of the plaintiff, and build bridges, to the great injury and damage of the plaintiff, &c.

The defendant's answer first denies each and every allegation in the complaint. For a second answer, the defendant admitted that, at divers times claimed in the complaint, he had been upon the ground in and along a certain locality in said town, known as the plank road, and had done various work therein, in repairing the same and bridges thereon; that such acts and labor were such only as were necessary and proper in repairing such road and bridges, in obtaining bridge timber and other articles necessary for such purpose, and "which are the acts complained of in said complaint; that at the times aforesaid said locality was a public highway, used and occupied by the public as such, and at such times of said alleged wrongs and acts upon, in and on said locality and premises, the said defendant was acting pursuant to the orders and directions of the commissioners and overseers of highways of said town, as he of right might do, and all he did there was in pursuance of such authority and directions, in repairing and fixing such road."

There is a further answer, that prior to the acts set forth in the second answer to the complaint, the Fredonia and Sinclairville Plankroad Company owned the locality, and had full right and authority to use the same, and that such company had abandoned said locality, and the same reverted to the public and belonged to the town of Gerry for the purposes of a highway, and was worked and improved as such, and that all *acts* done prior to such abandonment were pursuant to the authority and direction of such corporation.

There is another answer, that after the commission of said alleged wrongs and trespasses, and each of them, the damages in consequence thereof were properly and duly appraised by proper authority, and said plaintiff duly notified thereof, and such damages were duly tendered and paid to said plaintiff, and are brought into court for his use and benefit.

There is a further answer, that the acts done by defendant

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upon and about said premises, as aforesaid, were fully ratified and confirmed and authorized by virtue of an act of the legislature passed April 13, 1866.

The defendant demands judgment for costs of suit. The defendant gave the undertaking required by the Code, and the justice countersigned the pleadings and dismissed the action.

The plaintiff brought this action. It was tried by the court, and the court decided that all the alleged trespasses committed within the limits of what was known as the plankroad, and then the highway, after the plankroad ceased to occupy, were justifiable. The plaintiff, on the trial, proved certain trespasses committed in his field, outside of the bounds of the highway; and the court overruled the defense of a tender of the damages, and directed a judgment for damages for the trespasses outside of the highway, for three dollars. The judge before whom the trial was had, at the instance of the defendant's attorney, certified that on the trial title to real estate was in issue, so far as the line of the "old plankroad was concerned;" and that as to the alleged trespasses thereon, the court reported in favor of the defendant. That as to the alleged trespasses outside of the line of the road, title to real estate did not come in question on such trial. Each party claimed a full bill of costs. The clerk taxed the defendant's bill, and refused to tax the plaintiff's bill.

A. HAZELTINE, *for plaintiff.*

C. N. LOCKWOOD, *for defendant.*

MARVIN, J. The second and third answers of the defendant justify all the acts of which the plaintiff complains, on the ground that the *locus in quo* was, at the time the acts were committed, a highway used by the public, and belonging to the town or the plankroad company.

The justice must have so understood these answers. He

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did not understand that there were any alleged trespasses not met by these answers, and which remained for trial under the issue formed by the general denial. The defendant tendered the undertaking required by law, and demanded judgment for costs of suit. The justice was right in dismissing the action.

It is now claimed by the defendant that the complaint embraced different causes of action; that is, causes of action for the alleged trespasses upon the lands included in the highway, and also causes of action for the trespasses committed upon the lands of the plaintiff, outside of the bounds of the highway, and that the defendant intended only to justify his acts in the highway, and that his answers should be so construed.

This claim is unfounded. The plaintiff, in his complaint, says nothing of any highway. He alleges that the defendant wrongfully broke and entered his close, in the town of Gerry, and at the times named, and then and there did certain acts. He ignores any highway. If he should be right in his position that there was no highway, then it would be immaterial whether the trespasses committed were confined to a strip of land four rods in width, or extended over a wider space.

The defendant begins his answer by admitting that he had been upon the ground in and along a certain locality in said town, known as the "plankroad," and had done certain acts, "which are the acts *claimed* in said complaint," and that said *locality* was a public highway, &c., &c., and that at such times of said alleged wrongs and acts upon, in and on *said locality* and premises, he was acting pursuant to the directions of the commissioners and overseers of highways of the town, as he of right might do. It is not necessary to refer more particularly to the next answer. It is equally definite, and extends to all the acts complained of by the plaintiff. On the trial, the defendant succeeded in justifying all his acts upon a certain strip of land, by showing that it was a highway; but he had trespassed outside of this strip of land,

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and for these trespasses he had no justification, and three dollars damages were allowed. Which of the parties is entitled to costs? "If the judgment in the supreme court be for the plaintiff, he shall recover costs; if it be for the defendant, he shall recover costs, except that upon a verdict he shall pay costs to the plaintiff, unless the judge certify that the title to real property came in question on the trial." (*Code*, § 61.)

In this case the *judgment* is for the plaintiff, and he is entitled to costs. The word *judgment*, as here used, means a recovery of damages by the plaintiff, evidenced by the verdict or the finding and decision of the court, entitling the plaintiff to a judgment.

The right to costs is to be determined by the recovery, confining the parties to the issue touching title.

In *Burhans* agt. *Tibbits* (7 *How. Pr. R.* 74), Justice WRIGHT says, "that when the section speaks of a recovery in an action where a claim of title arises, it means that such claim of title shall arise on the entire pleadings, and that the recovery shall be in hostility to such claim."

In the present case, the recovery by the plaintiff is in hostility to the claim of title set up by the defendant, as the defendant's claim of title was not limited to any particular piece of land, but was co-extensive with the alleged trespasses.

Hall agt. *Hodskins* (30 *How. Pr. R.* 15) is in point in this case. In that case the action was trespass for breaking and entering the close of the plaintiff, and the defendant answered that the acts complained of were done in and on a certain road which he had a right to use. On the trial, the defendant gave evidence tending to establish a road across the plaintiff's close, and the plaintiff abandoned any claim for damages for acts committed on the alleged road, but claimed damages for the trespasses outside of the road, and he had a verdict for \$1.56. At special term it was decided that the defendant was entitled to costs. Upon appeal to the general

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term, the order of the special term was reversed, and costs were given to the plaintiff. The case contains the arguments of counsel, which are very able and elaborate. The opinion of the court is by BOCKES, J. In it the learned judge fully considers and ably discusses the questions presented in that case, and they are the same as those now under consideration in the present case; and concurring in the views taken by the court in that case, I do not think it material that I should add any further remarks. It may be well to reiterate what is said in the opinion in that case, that if the defendant wishes to justify certain of the alleged trespasses under a right of way, he should describe the way, and limit his justification to the *locus in quo* particularly described. The pleadings now in a justice's court are, complaint, answer and demurrer, and no other are allowed. The issue or issues must be framed before the justice. In the present case, the defendant should in his answer have carefully described the highway, and limited his justification to the premises so described; and then, as to all alleged trespasses other than those within the limits described, he could have interposed a denial, or license, or any defense he had other than title. The justice, upon the giving of the undertaking, would dismiss the action as to the alleged trespasses upon the close embraced by the answer setting up title, and would proceed to the trial of the issues touching the alleged trespasses not justified by the plea of title, in case the plaintiff should decide to proceed in his action for such trespasses. If the plaintiff should not claim that any trespasses were committed outside of the *locus* particularly described by the defendant, then the action would be dismissed generally; and I think the plaintiff, in his action in this court, would be confined to the *close* particularly described by the defendant, and in which the answer and defense of title applied. In this way no difficulty can arise. The defendant must see to it that his answer in the justice's court is not too broad.

The exception contained in section 61, to wit., "that upon

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a verdict, he (the defendant) shall pay costs to the plaintiff, unless the judge certify that the title to real property came in question on the trial," has no application to the present case. This embraces costs when the defendant has a verdict. He may have defeated the plaintiff upon grounds entirely aside from any question of "title to real property," and such title may not have come in question on the trial; and if so, he shall not have costs, but shall pay costs, because he, by pleading title in the justice's court, caused the litigation to be removed in the supreme court. This was not a case for the certificate of the judge, and the certificate given has no effect upon the question of costs.

The plaintiff's motion must be granted, with \$10 costs.*

* NOTE.—This case, the case of *Hall agt. Hodekins* (30 How. 15), and the case of *Shall agt. Green* (34 How. 418), seem to establish the following principles and rules, to wit:

1st. In an action of *trespass quare clausum fregit*, brought in a justice's court, the defendant should not put in an answer of *general denial*, unless he intends to justify or defend his acts as to the *entire locus in quo*.

2d. If the defendant desires to justify or defend certain of the alleged trespasses under a right of way, or upon a portion of the premises only, he should describe the way, or such portion of the premises, and limit his justification or defense to the *locus in quo* particularly described; and then, as to all alleged trespasses other than those within the limits described, he can interpose a denial or license, or any defense he may have other than title.

3d. In the latter case, the justice, upon the giving of the proper undertaking, should dismiss the action as to the alleged trespasses upon the close embraced by the answer setting up title, and proceed with the trial of the other issues not justified or defended by plea of title, in case the plaintiff should decide thus to proceed.

4th. If the plaintiff should not claim that any trespasses were committed outside of the *locus in quo* particularly described by the defendant in his answer, then the justice should dismiss the action generally, and the plaintiff, in his action in the supreme court, would be confined to the close particularly described by the defendant, in which the answer or defense of title applies.

5th. The issues in such action must be framed before the justice, where no other pleadings than a complaint, answer and demurrer are allowed. And it lays with the defendant to limit his justification or defense of title to meet his own views in this respect; he can make the issue of title as broad or as narrow as he chooses, and must take the consequences of raising an issue against his adversary which he cannot maintain.

6th. A cause of action for *trespass on land* is different from one of *trespass quare clausum fregit*. In the former, there may be a lawful entry on the land, and a trespass committed thereon after such entry; and a *general denial* in the answer to such action would not necessarily raise the question of title: whereas, in the latter case, the gist of the action is an unlawful entry upon the land, and to authorize a recovery,

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SUPREME COURT.

BANK OF PRINCE EDWARD'S ISLAND agt. CHARLES H.
TRUMBULL.

A bill of exchange, drawn and accepted, "payable in United States gold coin," must be paid in gold, or its *equivalent*, if paid in legal tender notes.

We have two standards of value recognized by law, the one gold and silver, the other paper; either is a legal tender for a debt, and a contract which calls for payment in gold, calls for payment in a currency recognized by law, and there is nothing in law or in reason which forbids the parties from making such agreement; and when it is manifest that it was the intention of the parties that payment should be made in coin instead of paper, it is the duty of the courts to carry into effect such intention.

New York Special Term, April, 1868.

ACTION on a bill of exchange, drawn "payable in United States gold coin," accepted by the defendant.

BARLOW & HYATT, *for plaintiff.*

CHAPMAN & SCOTT, *for defendant.*

MULLIN, J. The general term in the first district, held, in the case of the *Bank of the Commonwealth* agt. *Van Vleck and Tucker*, in December last, that the plaintiff, who

the plaintiff must show a breach of the close; consequently, a general denial in the answer in such action necessarily raises the question of title.

7th. The exception contained in the 61st section of the Code, "that upon a verdict, he (the defendant) shall pay costs to the plaintiff, unless the judge certify that the title to real property came in question on the trial," embraces only cases where the defendant has a verdict; that is, he may defeat the plaintiff upon grounds entirely aside from any question of title, and which question does not arise on the trial, then he shall not have costs, but shall pay costs, because, by pleading title in the justice's court, he causes the litigation to be removed to the supreme court.

8th. Where the defendant, by his answer, justifies the trespass upon a portion of the *locus in quo* particularly described by him, and the plaintiff removes the whole action into the supreme court, he takes the risk of paying costs to the defendant where he fails to recover for the trespasses upon the portion of the *locus in quo* particularly described by the defendant, although he may recover less than \$50 damages for trespasses on other parts of the *locus in quo*. The latter trespasses should have been left to be tried before the justice. It would be otherwise where the entire cause of action should be removed to the supreme court by the answer of title by the defendant; there the plaintiff, on recovery of any sum upon any portion of the *ocus in quo*, would be entitled to costs.—REP.

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had loaned to the defendant \$10,000 in gold, to be paid in gold, was entitled to judgment for an amount equal to the value of the gold at the time of the trial in legal tender notes.

The plaintiff in the case before me claims to recover judgment for a sum in currency equal to \$2,000 in gold, upon a bill of exchange, drawn for that sum in Charlottetown, in Prince Edward's Island, by A. A. McDonald & Bro., on the defendant, payable in sixty days from the date thereof, and which was presented to and accepted by the defendant. The bill upon its face is payable in United States gold coin.

It will be seen that the cases are identical in principle; and whatever my own views of the law might be, respect for the court that decided the case of the *Bank of the Commonwealth* agt. *Van Vleck and Tucker* would constrain me to follow its decision, leaving it to the court of appeals to reverse the judgment if, upon more full examination, it shall be found to be erroneous.

I heard this case in that district, while holding court at the request of the presiding justice. I am not, therefore, at liberty to disregard a decision of its general term upon the precise question presented to me for decision.

I cannot leave the case, however, without briefly giving my reasons for concurring, as I do, in the conclusion at which the general term arrived in the case cited.

The constitutionality of the legal tender act is not open for discussion in this state, since the decision of the court of appeals in the case of the *Metropolitan Bank* agt. *Van Dyck* (27 N. Y. R. 400). It is also the settled law of the state that in actions for the recovery of debts contracted before the passage of the legal tender act, the plaintiff can only recover the sum agreed to be paid, without any allowance for the difference in value between gold and legal tenders, notwithstanding the debtor may have agreed to pay it in gold or silver coin.

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It must be considered, also, that the courts of this country that have been called to pass on this question, have been nearly unanimous in holding that debts contracted since the passage of the legal tender act, payable by the express agreement of the debtor in gold and silver coin, may be paid by the same amount in legal tender notes.

A contract entered into prior to 1862 for the payment of a given sum of money in gold and silver coin, received the same construction as it would have received had the words specifying in what the payment should be made not been in the contract. It was by law payable only in gold and silver coin, at the election of the creditor, if that provision had not been incorporated in it; in other words, it was construed as if it read, "payable in legal currency." When, therefore, such a contract was to be satisfied by payment since 1862, it receives the same construction, and is paid by an equal amount of legal tender notes. This construction of the contract became indispensable; or debtors would have been ruined, and the business of the country destroyed.

If this construction had practically the effect of taking from the creditor a portion of his property, it operated with equal severity upon the debtor; his property was reduced in value in the same proportion. The loss fell equally upon all classes. It was a part of the price we had to pay to save the republic. It operated very harshly upon the foreign creditor, whose debt contracted before the war, and payable in this country, to compel him to accept payment in paper in lieu of gold and silver. But it was impossible to have one rule of law for our own citizens and another for foreigners; the same rule of construction must apply to both, and hence each must accept the same measure of satisfaction.

Every contract then made was made impliedly if not expressly subject to the power of congress to make paper instead of coin a legal tender, or to debase the coin so as to render it of no more value than the same amount in legal

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tender notes. Whether such laws are just or wise, is a question for the legislative department, and with which the courts of the country have nothing to do.

Congress did not see fit to debase the gold and silver coin of the country, nor has it repealed the law making gold and silver a legal tender in payment of debts, but it has secured a similar result by making a thing of inferior value of equivalent value in payment of debts. The debtor is no longer obliged to pay gold and silver, and the creditor is obliged to accept government notes in satisfaction of his debt.

The intrinsic difference in value between the paper made a legal tender by congress, and gold and silver, is recognized both at home and abroad. Property is sold in our own and foreign markets at one price for gold, and for another in paper. This distinction can no more be got rid of than can the distinction between the cotton or linen out of which the paper is manufactured on which these notes are printed, and the metal out of which the coin is made.

It was not, I apprehend, the intention of the framers of the legal tender act to prohibit the making of contracts payable in coin. The necessities of commerce require that such contracts should be held valid. To hold that they cannot be made would be a most unwise and unnecessary interference with the rights of the citizen, and is uncalled for by the creditors of the government, or the necessities of the people.

A merchant in New York orders from a manufacturer in England, \$5,000 worth of cotton goods; the Englishman understands this to mean \$5,000 worth of goods, estimating the dollar as a dollar in gold; the account is made out on this basis. If the sale is on credit, and to be paid in this country, the seller can only be paid by \$5,000 in gold, or their equivalent.

To obtain this he must make out his account by adding to the \$5,000 the amount necessary to make legal tender notes equal to gold. Before his account can reach this coun-



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try, gold may have materially increased or lessened in price. By taking the value of gold on the day he ships the goods, he may subject himself to a loss, if gold should appreciate in value before the account is adjusted, or he may be demanding more than the purchaser is bound to pay if it has depreciated. If he leaves the amount to be adjusted by the purchaser, a door is open for misunderstanding and litigation. Between countries enjoying the advantages of telegraphic communication, this difficulty may not arise, but there is still so large a portion of the world with which we have dealings that has no such communication, that the practical difficulty exists in all its force.

It is also true that merchants may provide by these contracts against the annoyance to which I have referred. But the fewer restrictions upon and embarrassments laid in the way of commercial intercourse, the better. Instead of subjecting merchants to this uncertain and unsatisfactory mode of dealing, why not permit them to agree that an indebtedness shall be payable and paid in gold or silver, or its equivalent in paper? It cannot be doubted but that when a contract made since 1862, provides for payment of a given sum in gold coin, that is the intention that it shall be thus paid. If the *intention* of the parties is to govern, what right have the courts to disregard it and compel the creditor to receive a sum less than it was the understanding and *intention* he should receive?

The reasoning of the judges seems to be that when the contract is to be performed here, the amount to be paid by its terms must be understood as payable in legal tender notes, and that the parties cannot agree that it shall be paid in coin. If it is legally possible for parties to bind themselves thus to pay, the defendant has done it in this case; the language is not open to two constructions, and the intent is perfectly obvious. To reach the result stated, the courts have been governed by the doctrine of the case of *Penney* agt. *Gleason* (5 *Wend.* 394). In that case the de-

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fendant's agreement was to pay a certain number of dollars and cents in salt, at a price named per barrel; the court held that the measure of damages for a breach of the contract was the amount named in the contract, and not the value of the salt. The reason of the chancellor is, that by the contract the defendant had an election to deliver the salt, or pay the amount in money; and having failed to deliver the salt he was bound to pay the money.

I am unable to perceive that the decision in that case has any application to this. Salt was not and had never been a standard of value. Gold has been and is by law a legal standard of value. The price of salt was not fixed, but fluctuated as did other commodities in market. Gold has not in fact varied in value. The paper which has been made a legal tender in payment of debts has varied, and because it is made a legal tender, and gold has thereby been treated as an article of merchandise, its value seems to fluctuate, whereas it is that of the paper only which fluctuates. That it is not the coin that changes in value, is proved by its being received in payment of debts in foreign countries at the same valuation it received before the act of 1862, and is so received here when we are required to go back to the gold standard.

We know that the value of the American gold dollar is to-day, in this country and in Europe, of the same value it was seven years ago, and that value is not changed because we have established another and wholly fictitious standard, with respect to which, and with respect to which alone, its value has changed.

We have, as I have already suggested, two standards of value recognized by law, the one gold and silver, the other paper; either is a legal tender for a debt, and a contract which calls for payment in gold, calls for payment in a currency recognized by law, and there is nothing in law or in reason which forbids the parties making such an agreement; and I insist that when it is manifest that it was the inten-

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tion of the parties that payment should be made in coin instead of paper, it is the duty of the courts to carry into effect such intention.

If the \$2,000, to pay which the bill in suit was drawn, were borrowed, the borrower, it is to be presumed, received it in gold, or in property at gold prices.

If the bill does not provide for the payment of \$2,000 in gold, will any one inform me how the lender could have framed his contract so as to secure to himself payment by the drawee of that sum on the day it should be presented for acceptance or payment and interest? As I have attempted to illustrate in the case of the purchaser of the goods in England, it would be practically impossible to fill up the bill with an amount which, if paid in currency, would exactly equal the same number of dollars in gold. He might transmit the bill in blank to an agent to fill up with the true amount before presentation, or he might draw the bill, "for such sum as will, on the day of presentation for payment, be equal to \$2,000 in gold."

But when the bill is thus drawn, is the intention of the parties any more clearly expressed that the bill is to be paid in gold or its equivalent, than when it is drawn "payable in gold coin of the United States?"

The sum named in a bill or other contract is, in the absence of any provision to the contrary, presumptively payable in whatever is at the time a legal tender in payment of debts; but when the parties designate some other currency which is not illegal, it is the right of the creditor to have awarded to him such measure of damages as will constitute payment in the currency intended, and it is the duty of the courts to award it. If gold and silver were not, both in law and in fact, legal currency recognized and adopted by all classes of men, there might be some excuse for treating them as if they were articles of merchandise, and the debtor had the right to pay in them or in paper, at his election. But so long as they are recognized as currency, debts payable in

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them should be enforced, and the intention of the parties should have effect.

I therefore order judgment in favor of the plaintiff for \$2,925.

UNITED STATES DISTRICT COURT.

IN THE MATTER OF CURTIS JUDSON, A BANKRUPT.

Where a bankrupt is under examination before a register, he has no right to consult with his attorney or counsel before answering, except the register shall see good cause for allowing it.

Southern District of New York, March, 1868.

In an examination of the above named bankrupt, upon the application of Thomas Hope, a creditor, under section 26 of the bankrupt act, general orders, rule 10:

This question has arisen, and the same is certified to his honor, Judge BLATCHFORD, with the facts. The counsel for the creditor propounds a question to the bankrupt under examination, and requires a direct answer. The counsel for the bankrupt claims the right to counsel with and to prepare and answer for the bankrupt, before he answers the question. To this the counsel for the creditor objects, and claims that the bankrupt is a witness, and must be examined as a witness, subject to the same rules and privileges as other witnesses.

This brings up the question: Can a bankrupt, during his examination, consult counsel, and have his advice as to the answer to be given, or have the answer framed for him by his counsel, or can he, while on the stand as a witness, advise with or consult his counsel as to his answer?

In the state courts in this state, in examination under supplementary proceedings, a practice has grown up of allowing the person so examined to have counsel. The case of *Levey* agt. *Halsey* (1 *Duer*, 589), also reported in 1 *Code R.*, N. S.,

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275, is cited as an authority for such practice, but the decision in that case does not authorize any such practice.

By the act of congress, July 16, 1862, it is the practice of the U. S. district courts to follow the rules of the respective state courts in regard to all questions of evidence, and the examination of witnesses. Since the act of July 16th, 1862, parties to the action or proceedings are also witnesses.

The examination of a party to an action or proceeding is a recent innovation upon the common law. In this state, in the year 1818, an act was passed authorizing the examination of a plaintiff as a witness, in certain cases; again, in the year 1820, making plaintiffs competent as witnesses in certain cases. In 1835, an act was passed whereby, in suits on bills of exchange and promissory notes, the plaintiff was entitled to the testimony of any defendant as a witness. A defendant was also entitled to the testimony of any co-defendant as a witness. In 1850, the act relating to the loss of baggage in railroads was passed, whereby the plaintiff, in an action for the loss of baggage, could be a witness and prove the loss of the articles, &c., &c.

The passage of the act of 1847, authorizing the examination as a witness of the parties to the action, sections 1, 2 and 3 were as follows:

“An act to authorize parties in civil suits, at their election, to obtain the testimony of the adverse party;” passed 1847, chapter 462, page 630.

“§ 1. Any party in any civil suit or proceeding, either in law or equity, had before any court or officer, may require any adverse party, whether complainant, plaintiff, petitioner or defendant, or any one of said adverse party, any and every person who is beneficially interested in said suit or proceedings, though not nominally a party, to give testimony under oath in such suit or proceeding; and such adverse party may be examined orally, or under a commission, in the same manner as persons not parties to such suit or proceeding, and

who are competent witnesses therein; and such parties may be subpoenaed and his attendance as a witness compelled, or he may be examined by a commission, or conditionally, or his testimony perpetuated in the same manner as any competent witness.

“§ 2. The court or officer before whom such suit or proceeding may be had shall have power to dismiss the bill, petition or proceeding of any party, or any part thereof, with costs, or nonsuit any party, or strike out or disregard any defense, or any part thereof, of any party who shall refuse to testify.

“§ 3. Any party in any suit or proceeding as aforesaid shall be required, to entitle him to examine the adverse party as a witness in any such suit or proceeding, to summon such adverse party to attend the trial or hearing in such suit or proceeding, to give testimony therein, in the same manner as the attendance of witnesses in ordinary cases.”

The act of congress, July 16th, 1862, provides:

“That the laws of the state in which the court shall be held shall be the rules of ——— as to the competency of witnesses in the court of the United States.”

The wife of a party to the action, although a party to the suit, could not be compelled to testify as a witness by the defendant by the state law (5 *Barb.* 156); but by the act of May 10, 1866, she now can be, and under the bankrupt act she can be subpoenaed as a witness, and unless she testifies as per section 26 of the bankrupt act, the husband cannot be discharged.

In 1849, the Code of Procedure was enacted. By section 292, a judgment debtor could be examined in the same manner as any other witness by that act; the examination of a party was the same as the examination of a witness. Same by all the previous statutes.

By a careful perusal of section 26 of the bankrupt law, the act of this state, 1847, sections 1, 2 and 3, and of section 292 of the Code, it is fair to infer that section 26 of the

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bankrupt law, as well as general orders in bankruptcy, rule 10, were founded upon the act of New York, 1847, and the Code, section 292. Consequently the same rules as to the taking of the testimony of parties to an action or proceeding should govern the examination of witnesses in the United States district courts. The bankrupt is examined as a witness at the instance of the creditor, who is the adverse party.

The examination of a bankrupt is an examination in open court, upon the trial of the cause, and must of necessity be an oral examination; and it is in the discretion of the court to allow the bankrupt counsel on an examination, even the counsel of record in the cause. (*Peabody agt. Harman*, 3 *Gray*, 113.)

I hold that the bankrupt must be examined as a witness, the same in all respects as if examined as a witness in any cause on trial in the district court. Counsel may raise any objection, or take any exceptions, the same as at a trial in the district court. But the witness, be he the bankrupt or any other witness, cannot during such examination consult with counsel, or receive advice or suggestions from any person.

The counsel for the bankrupt should be allowed to examine him as to any matter pertinent to his examination by the creditor (1 *New York Legal Observer*, 119), or as to any matter set forth in the schedules.

Bankrupts are unwilling witnesses. Their examination should be full, fair and searching, not irrelevant (*Ex parte Legge*, 17 *Jurist*, 415); should relate to all matters tending to show the bankrupt to have property other than that mentioned in the schedules. (*Page 20 Manual of the U. S. Bankrupt Act, and the cases there cited*; 1 *Duer*, 589.) He must answer all questions touching or concerning his property, or any question tending to show he has property, interest in property, or rights in action, not mentioned in his schedules, as required by the bankrupt act and rules therein. The

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schedules are his direct examination, and his examination by the assignee or creditor is a cross-examination.

In this case the bankrupt is attended by two good lawyers, who claim the right to consult the bankrupt as to his answers, and to frame them for him, and cite the *Patterson case*. (*Internal Revenue Record*, vol. 6, p. 165; 1 *Duer*, 589, and *Law Rep.* 514.) Register Dwight held: "That in his opinion the bankrupt should have the privilege of consulting with his counsel while under examination, provided that such consultation does not cause delay in the proceedings." And the judge held: "Within the limits above stated by the register, that is, to the extent of allowing to the bankrupt the privilege of consulting with his counsel while under examination, provided such consultation does not cause delay in the proceedings, the register is the proper judge of the propriety of allowing to the bankrupt such privileges, and the court will not interfere with the exercise of such discretion in ordinary cases."

In this case I hold that the counsel's consultations with the bankrupt during the examination, and also in part preparing the answer of the bankrupt in this cause, does cause delay in the proceedings, also hinders and impedes the proceedings, causing much delay, but not more so than consultations with counsel and the preparation of answers necessarily require. To the courts allowing counsel to the bankrupt on his examination, counsel for the creditor is strenuously opposed, citing 3 *Gray*, 113, as authority to the contrary, and it is evident that if the bankrupt can have counsel to prepare his answers to the questions asked him, the examination must be greatly impeded and the examination prolonged to an intolerable length, the examination of the bankrupt becomes the examination of his counsel, which would at once defeat the intention of the law and render the examination of a bankrupt under section 26 of the bankrupt act a mere farce. Some rule should be adopted whereby the rights of a bankrupt under examination should be defined

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and definitely settled, and the way in which a bankrupt should be examined minutely specified.

In this case I hold the examination of the bankrupt under section 26 of the act and general orders, rule 10, shall be conducted in all respects before me at the chambers of this court, as if the cause was in progress of trial before the judge of the district court.

That the bankrupt, Curtis Judson, must take the stand as a witness, must answer the questions without advice or consultation with any person while on the stand as such witness. And that the bankrupt cannot consult with his counsel, or with any one, while on the stand as a witness, as to the way or manner he shall answer the questions put to him.

Since writing the above decision, I have seen the opinion of Judge LOWELL, United States district court, Mass., in the *matter of Edward P. Tanner*. The court held that a bankrupt under examination has no right to consult with his counsel except when the magistrate before whom the examination is conducted has good cause for allowing it. (Vol. 1 *Bankrupt Register*, p. 59.) His opinion is very full and covers the point taken in this case by the counsel for the bankrupt.

The counsel for the bankrupt except to the ruling of the register, and ask that the same be certified to your honor. Respectfully submitted.

JOHN FITCH, *Register*.

BLATCHFORD, J. I have carefully examined the decision of Judge LOWELL in the case of *Tanner* and concur fully in his views in all respects as there expressed.

The clerk will certify this decision to the register, John Fitch, Esq.—March 11, 1868.

The following is the opinion of Judge LOWELL above referred to :

LOWELL, J. The register, by agreement of the parties,

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has certified the question whether a bankrupt, upon his examination under section 26, has a right to answer by the mouth of his attorney. The law at section 26 provides for an examination of the bankrupt in writing, as to all matters concerning his trade dealings, debts, property, &c. It is plain, upon the whole tenor of the section, that the examination may be had before the court or before a register, and that the debtor is to be personally present, and to make answer substantially like a witness, and not merely to have interrogatories filed or propounded after the manner adopted in equity and admiralty in certain cases. Whether the requirement that it shall be in writing, means that the questions shall always be in writing, if required by either party I do not now decide, but I do not think it is intended that the bankrupt himself or his attorney shall write the answers, but merely that the deposition shall be reduced to writing and signed by the bankrupt.

Since the examination may extend to the bankrupt's whole business life, and may involve large interests of himself and his family, and of other persons who have dealt with him, he should have every proper facility for refreshing his recollection and for making true and careful answers. He may need to consult books and papers, and sometimes, no doubt, to consult counsel, but it seems to me impossible to lay down any general or peremptory rule of law governing such consultations.

In an early case under the insolvent law of Massachusetts, the supreme judicial court is said to have held that the insolvent is absolutely entitled to this privilege. The case is very briefly reported, and without reasons given, but it has been accepted and acted upon ever since. (*Ex parte Windsor* 8 *Law Reporter*.) The practice which has followed this adjudication has been, as I believe the bar will generally concede, unfavorable to the ascertainment of the truth in these investigations, by reason of the great labor and delay of proceeding in that mode, and there is some reason to be-

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lieve that if the question were new, the same court might now decide it differently; for, in *Peabody* agt. *Harmon* (3 *Gray*, 113,) they refused this privilege to a creditor under examination in support of his debt, and many of the reasons for the decision apply with great force to all examinations; and the rule there laid down, that such matters must be left to the judgment of the examining magistrate, appears to me to be of general application. It is not to be supposed that a register will deny the bankrupt, or a witness, such reasonable opportunity to see his books and papers, and to consult concerning his rights, as will enable him to answer understandingly, and with all proper reservations, the questions that may be asked him. In England, Lord Chancellor HARDWICKE refused to make a peremptory order in a similar case, but recommended that the petitioner (a woman) should be allowed the privilege. (*Ex parte Parsons*, 1 *Atk.* 204, and see *Ex parte Bland*, *Id.* 205.) And such appears to have remained the rule of practice there. (1 *Christian Bankruptcy Law*, 385, 1 *Mont. and Ayr. B. L.* 385, 2d *Ed.*) I do not say that on a motion to commit for not answering, or in some other mode, the judgment of the register might not, in some cases be received; but that there is no general rule of law to be laid down upon the subject, and that, as a matter of practice, it is highly inconvenient that one should be adopted which should tend to mischievous delay without any corresponding advantage. The questions to a bankrupt are usually concerning matters of fact, and, in the vast majority of cases, involve nothing requiring advice or consultation; and the presence of counsel with the right to object to improper questions, and to uphold the rights of the bankrupt in substantially the same manner that he would do if his client were called on the stand as a witness in his own cause in any other court, and with the further reserved right to advise with him concerning his answers, when the register can see cause therefor, meets, as it seems to me, all the requirements of justice in this regard.

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COURT OF APPEALS.

CHARLES KING, EDWARD J. KING and SYLVESTER BRUSH,
respondents agt. WILLIAM H. PLATT, SPENCER C. PLATT
and NATHAN C. PLATT, executors of NATHAN C. PLATT,
deceased, appellants.

Although a *public judicial sale* of valuable city lots is not void because it takes place on an *election day* of a city charter election, yet, where it appears that, in addition to the fact that the sale was made on a day most unfavorable to a large gathering, and after a written notice to the referee from the defendant, the person to be most affected by it, that he would consider it "unjust and oppressive;" that the lots were sold in an order contrary to the defendant's directions and wishes, and apparently detrimental to his interests, and under circumstances which gave rise to apprehensions that free competition was interfered with, the sale will be set aside and a re-sale ordered.

September Term, 1867.

THE action was brought in February, 1861, to compel the specific performance by Nathan C. Platt, the original defendant, since deceased, and now represented in the action by the present defendants, of an agreement to purchase real estate in the city of New York, which agreement was made September 6, 1860. The defendant not having complied with the terms of the agreement, for the alleged reason that outstanding judgments unsatisfied existed as a lien upon the property, and not having answered the complaint, judgment was entered in favor of the plaintiffs, on the 15th of March, 1862. By this judgment it was determined that the balance of the purchase money unpaid, with interest, was \$78,412.60, and it directed the defendant to complete the purchase within ten days, by paying the costs of suit, &c., and \$22,160.60 of the purchase money due, and to execute and deliver his bond and a mortgage on the premises for \$56,250, payable October 6, 1866, with semi-annual interest; and that in default of so doing, the premises should be sold at public auction, and that the defendant should be liable for any deficiency that might occur on such sale.

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The defendant did not appeal from this judgment, nor comply with the terms thereof. Accordingly, the premises were advertised for sale, under the terms of the judgment, on the 18th November, 1862, and the same were sold at public auction on December 2, 1862, when the property was bought in by or on behalf of the plaintiffs, at a price which left a deficiency of about \$10,000 against the defendant; and on December 22, 1862, the premises were conveyed by the referee on the sale to the plaintiffs, the report having been duly confirmed.

On February 12, 1863, the defendant procured an order requiring the plaintiffs to show cause why the sale should not be set aside and a re-sale ordered. The affidavits to sustain this order, and the motion made thereon, disclosed the following causes or grounds of complaint:

1. That the sale was made on the day of a charter election in the city of New York.
2. That the auctioneer named in the notice of sale did not personally officiate at its commencement.
3. That the price bid was inadequate.
4. That the plaintiffs approached bidders at the sale, and deterred them from bidding, and prevented competition.

The counter allegations denied Nos. 3 and 4 of these charges, and, on the hearing of the motion at special term, it was referred to a referee "to take proof whether any, and if so, what inducements, communications or representations were made or held out by the plaintiffs or their agents, or in their behalf, or by the referee, to deter or prevent bidding at the sale.

On the coming in of the report made in pursuance of said order, and on the 18th December, 1863, the motion was denied.

On an appeal to the general term, the order of denial was affirmed, January 23, 1865.

The defendant now comes to this court, on appeal from the order of the general term.

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WILLIAM R. MARTIN and JAMES EMOTT, *for appellants.*
JOHN H. REYNOLDS, *for respondents.*

FULLERTON, J. The sale of the defendant's property was not void because it took place on the day of the charter election in the city of New York.

The statute provides that no court shall be open or transact any business, in any city or town, on the day of elections for other than town or militia officers. (1 R. S. 5th ed. p. 418, §§ 4 and 5.)

A judicial sale, although conducted by one of the officers of the court, and under its direction, is not the business of a court, within the meaning of this statute. The object of the law referred to undoubtedly was to remove all obstacles which might necessarily interfere with the free exercise of the elective franchise. If the ordinary business of the courts were permitted on election days, the attendance of witnesses and jurors could be compelled by compulsory process, and in that way they could be forcibly kept from the polls.

It was to avoid such an evil that the statute was passed. A judicial sale of valuable property on an election day, presenting a tempting opportunity for gain, might induce sordid men to forego the privilege of electors in order to promote their private interests; but their action would be voluntary, and freedom of action was all the law intended to secure.

The propriety of a forced judicial sale of a large and valuable property on an election day, when public attention would necessarily, to a great extent, be turned to other objects, after a written notice from the person who was to be most affected by it that he would consider it "unjust and oppressive," was, at least, very questionable, and although not of itself, perhaps, sufficient to warrant the court in setting aside the sale, yet, in connection with the other facts disclosed in this case, cannot fail to create in the mind an influence unfavorable to the plaintiffs.

The property which was the subject of this sale consisted

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of eight lots, situate on the corner of Fifth avenue and Fifty-ninth street, in New York city, at one of the entrances to the Central Park.

The order in which these lots should be sold was considered by the defendant a matter of interest to him, and, consequently, on the day of sale, he made a written request that the *corner* lot, which was conceded to be the most valuable, should be sold first. This request was made with the view to cause the property to bring the largest price, and was, therefore, a proper and reasonable one. It was not, however, acceded to, and the lots were sold in a different order. I have examined the papers in this case with care, to see what reason was assigned or could have existed for this course, and I have been unable to find any that is satisfactory. The referee who sold the property states in his affidavit that "in the exercise of his discretion" he caused the premises to be sold in parcels, and in the order adopted at the sale.

That the referee acted in good faith, so far as *his* action is concerned, his well known character for integrity leaves no room to doubt; but no reason for believing that the sale of the corner lot first, as requested, would have been *detrimental* to the sale, having been furnished by the affidavits, or suggested on the argument, I cannot but think that the referee's discretion was exercised unwisely. That the defendant's request was made in good faith, and founded on the belief that, if granted, it would have increased the amount which the whole property would have brought, cannot be doubted, and in that opinion he is sustained by six other persons who are experienced in the sale of property of a like character in the city of New York.

The case, therefore, resolves itself into just this: that while the sale of the corner lot *first could do no harm*, there was good reason to believe that it would result in a *benefit*. Under such circumstances, it is difficult to arrive at any other conclusion than that the defendant was unfairly dealt with. Whatever chance there was, however slight, that the order

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of sale he requested should be adopted would prove beneficial, he was entitled to, and to deprive him of it was a constructive fraud.

I have not overlooked the affidavits on the part of the plaintiffs, expressing the opinion that the property would have brought no more than it did if the corner lot had been sold first; yet I can see no good reason for not trying, at the least, a harmless experiment, to gratify a reasonable request of a failing and unfortunate debtor, which he thought would result to his advantage.

I do not agree with the learned counsel for the motion that the defendant had the right to determine the order of sale, and the authorities quoted do not sustain that position. But, in the absence of all directions by the court, the defendant has a right to be heard on the subject, his suggestions considered, and if for the best, followed.

But in the light of the other facts in this case, it is difficult to believe that the refusal to accede to the request was the result of indifference or mere caprice. The plaintiff's bought the whole of the property at the sale. Their right to do so, of course, is not disputed.

If it were fairly done, without any undue advantage, a court of equity could not interfere with the sale. But, besides matters already considered, there are facts disclosed in the papers which give rise to serious doubts as to the entire fairness of the plaintiffs' conduct of the sale.

From the whole evidence, it satisfactorily appears that the plaintiffs manifested a desire, before the sale, to purchase the whole of the property, and resorted to the means necessary to accomplish their object.

Raynor, who sustained intimate friendly and business relations with the plaintiffs, and who acknowledged that he would have the selling of the property as broker, in case the plaintiffs should purchase it, said to a bidder at the sale, that he could purchase the property in one parcel, *after* the sale, upon better terms than he could get it *then* by bidding.

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Raynor also testified that he made this communication at the request of one of the plaintiffs.

That this had a tendency to prevent competition at the sale can hardly be denied; and whether this effect was designed or not, it is equally fatal to the validity of the sale.

There is other evidence tending to show that the sale was chilled by the course pursued by the plaintiffs; but it is unnecessary to pursue the subject further.

The sale having been made against the defendant's remonstrance, on a day most unfavorable to a large gathering, and the lots having been sold in an order which induces a reasonable belief that it was detrimental to the defendant's interest, and under circumstances which give rise to apprehensions that free competition was interfered with, it ought not to stand.

Whilst the court secures to the creditor his just demand, and sequestrates the property of the debtor to satisfy it, it still sedulously guards his interests in all the various steps taken leading to a sale of his property. The unfortunate debtor is not beneath its protection. It will not tolerate the slightest undue advantage over him, even by pursuing the strict forms of law, or positive rules (*Story's Equity Jur.* § 239.)

Occupying a position of advantage, it behooved the plaintiffs to pursue their remedy with scrupulous care, lest they should inflict an injury on one who was comparatively powerless.

A court of equity justly scrutinizes the conduct of a party placed by the law in a position where he possesses the power to sacrifice the interests of another in a manner which *may* defy detection, and stands ready to afford relief on very slight evidence of unfair dealing, whether it is made necessary by moral turpitude, or only by a mistaken estimate of others' rights.

I feel quite convinced that sufficient reasons exist for set-

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ting aside this sale, and that justice will be subserved by doing so, for it cannot result in a loss to the plaintiffs.

The rights of third parties do not intervene, and the plaintiffs have a lien for the taxes and assessments they have paid. (*Cortright* agt. *Cady*, 23 *Barb.* 490.) A resale will probably result in satisfying the judgment and all the outlays of the plaintiffs, and that is all they can reasonably ask.

If the parties fail to agree upon the order in which the property shall be sold, either party can apply to the court for instructions to the referee (*Collier* agt. *Whipple*, 13 *Wend.* 229.)

The orders of the general and special terms should be reversed, the sale set aside, and a resale ordered.

All concur except PARKER, J.

PARKER, J. (dissenting.) This was an application to the supreme court to set aside a sale of real estate had under a judgment in the action, which was for a specific performance, and for a resale of the premises, on the grounds that the sale, which was in the city of New York, was made on the day of the charter election of that city; that the referee refused to sell the lots in the order requested by the defendant; and that the plaintiff, with a view to bid off the premises himself, discouraged bidders from bidding, whereby he was enabled to purchase the property at less than its value.

The sale cannot be pronounced irregular because held on the day of the charter election, for the prohibition of the statute against the transaction of business by courts upon the day of election does not extend to judicial sales. The circumstance of a sale being held upon that day, against the remonstrances of the defendant, may be an element in a case made for setting it aside as unreasonably conducted, when, in consequence of such election, bidders did not attend, and the property for such reason failed to bring a fair price. But no such facts appear in this case.

The refusal to sell the lots in the order requested by the

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defendant is, in verity, no reason for setting aside the sale. It does not appear that the referee abused his discretionary authority in regard to the order of selling, or that the defendant is harmed by such refusal. The only subject of inquiry is, whether the plaintiff so interfered as to prevent or discourage bidders from bidding, to the prejudice of the defendant.

The evidence, I think, comes short of showing any such interference. It is a sufficient answer to this allegation of the defendant, that the whole evidence, without any contradiction, shows that the property brought all it was worth. Not a single witness swears that he would have been willing, on the day of sale, to give more for the property than it brought on the sale.

Several, it is true, speak in general terms of its having been sold at low prices, and two say, if it were "*now*"—that is, at the time of swearing, which was some months after the sale—put up at auction, it would bring considerably more than it did bring on the sale.

But it is shown that between the day of sale and the time thus spoken of, gold had advanced from 131 to 150 and more, and that real estate had risen in the market from that cause, as well as from an increased desire to invest in it. The sale was fairly conducted, and the property brought all it was worth. The defendant should not now be permitted to speculate out of the rise of property, after having omitted to take any measures to have the lots bid in for his own on the day of sale.

The order denying his motion was properly affirmed by the supreme court, at general term; and the order of affirmance should here be affirmed with \$10 costs.

Reversed.

People *ex rel.* Henry agt. Cornell.

SUPREME COURT.

THE PEOPLE *ex rel.* RICHARD M. HENRY, respondent agt.
CHARLES G. CORNELL, appellant.

No member of a *municipal corporation* has the right to a *general inspection* of all documents in the hands of any *corporate official*, at all times and from any motive, or with any object or interest, irrespective of the fact whether he has any personal interest in such documents, or any information to be derived therefrom.

Such general inspection can be had only where the member has a private or personal in such documents or the information to be derived therefrom.

And this rule applies to a corporator who is also a member of a public association organized within the municipal corporation, and who makes application for such inspection on behalf of such association. (*Reversing this case*, 32 How. 149.)

New York General Term, April, 1868.

Present, BARNARD, P. J.; INGRAHAM and CARDOZO, *Justices*.

Appeal from an order at special term granting a writ of peremptory mandamus in this case.

The relator, Richard M. Henry, obtained from Mr. Justice GEORGE G. BARNARD, an alternative mandamus to Charles G. Cornell, street commissioner of the city of New York, commanding the latter to permit the relator to see and inspect certain contracts and vouchers on file in the street department of said city, or show cause to the contrary thereof. The relator's affidavit showed that he was a citizen of said city, and a member of the corporation, "The mayor, aldermen and commonalty of the city of New York; that Cornell was an officer of said corporation, being the head of the street department, a department of the government of said corporation; that said Cornell, as such street commissioner, had in his custody certain contracts for various public works done under his direction, and certain vouchers for payment of the public moneys of said corporation made for such works; that the relator had the right, as a member of said corporation, to see and inspect all such contracts

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and vouchers, and that it was the duty of said Cornell to exhibit them to any member of the corporation; that the relator had applied to said Cornell in August, 1866, for permission to see such documents, which was refused by said Cornell.

The street commissioner replied by a return, stating that he was, and always had been, willing to show such documents, but that the relator had demanded them as the attorney of the citizens' association, and claimed the right to take them; that he denied the *right* of the relator to see them; that such documents were in danger of destruction or mutilation, if they must be exhibited to any and every person; that to afford all the members of the corporation the right to inspect the files and records of his office would require additional offices and an additional staff of clerks beyond those allowed by law; that the relator must show some private personal interest in such documents before he should see them.

RICHARD O'GORMAN, *counsel to the corporation for appellant.*

The question for the court in this case is this:

Has any member of a municipal corporation the right to a general inspection of all documents in the hands of any corporate official, at all times, and from any motive, or with any object or interest, irrespective of the fact whether he has any personal interest in the said documents, or any information to be derived therefrom?

In the opinion of the judge who granted the writ (fol. 44) the question is in effect so stated.

The writ of mandamus is a prerogative writ issued in the name of the people, requiring a person or corporation to do some particular thing in the writ specified, which it is his or their office or duty to do.

The writ will not issue where the right is doubtful.

The relator must have a clear legal right to demand what is asked for in the writ. (2 *Crarey, Special Proceedings*, p. 50 and cases there cited.)

Now, had the relator a clear legal right to retain possession of all the contracts and vouchers made on behalf of the corporation in the year 1863, in the hands of the street commissioner, and take copies of the same?

Was it a part of the official duty of the respondent to deliver such possession?

There is no statute provision, or charter, or city ordinance obliging him to do so.

If there be any such obligation it depends on charter or law.

Is, then, an official of a municipal corporation, whose corporators are all the inhabitants of a city and who number over one million, bound, as a part of his

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official duty, to deliver possession of any or all of his official papers to any one of the said million who may apply therefor?

It is not alleged that the relator had any private or personal interest in any of the said papers.

He appeared, as is stated in the return, on behalf of the citizens' association.

It is not alleged that they had any private or personal interest in these papers.

The same demand might be made in behalf of any other association, whose object might be anything but praiseworthy.

Can any association of citizens—political, social, religious, conservative, or revolutionary—demand the possession of the official papers of any of the corporate officials?

The difficulties and confusion which would arise from such a rule are so great and manifest, that it seemed to the corporation imperatively necessary to obtain an authoritative decision of the court on the subject.

The court is not obliged to issue the writ in all cases. It lies in the discretion of the court, and will not be granted where great public inconvenience would be the result. (*Tapping on Mandamus*, p. 16.)

It is not argued, on the part of the respondent, that any citizen having any special object in obtaining information on any special subject has not a right to obtain that information, and to verify its correctness by personal inspection of the documents and vouchers relating thereto. The street commissioner offered the relator permission to do all that. All that is claimed is, that he has no right to take possession of all the documents, without any private or personal motive, but from any motive.

The reported cases in which questions of this nature have been discussed are, in some instances, of private moneyed corporations where stockholders had, for a specific purpose, demanded inspection of the accounts of the company.

There the right to inspect is plain and the motive easily understood.

Yet in these cases the courts have required from the relator evidence that "the party applying for such inspection had told his object in so applying." (*King agt. Wilts & Barkand Co. Ad. & Ell.* 479; *Angel & Ames on Corporations*, p. 717.)

But why was the relator so required to state his object?

Clearly in order that it should appear that he had a special personal object which concerned his own interest, and which he had the right to protect.

The interest represented by the relator in this instance is not his own private interest, or the private interest of any one.

He claims these documents as the representative of a public association of citizens who have assumed the office of protecting the public interest, and to be, in effect, justices and guardians thereof.

But the street commissioner himself holds that position by appointment of the mayor, with the assent of the common council.

He is himself a quasi-trustee, responsible indeed to the *cestui que trusts* for all wrong done to any of them, and bound to give information to any one of them, in any matter in which the inquirer is personally concerned.

It is a quarrel in this case, not between a *cestui que trust* and a trustee, but between a trustee legally appointed, viz., the street commissioner, and one who claims to be a trustee, but whose appointment is under authority of law but voluntary.

The relator appears here in the capacity of a public inspector, invested with powers to demand a general investigation, not by reason of any personal interest at stake, but by reason of his representing a superior public power, entitled to make such demand.

It is submitted that the cases referred to in the judge's opinion do not support the conclusion to which he arrived.

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They will be found on examination to be all cases where the fact of a special personal interest in the inquiry on the part of the inquirer was before the court.

Rogers agt. Jones, 5 *D. & R.* 484, was a litigation between his tenants of manor concerning a right of common claimed by both.

A mandamus was directed to the steward of the manor to exhibit the court rolls, which were the record of title in the matter.

There the relator claimed the aid of the court as a tenant; and as the rolls were his evidence of title, his interest in the examination of them was manifest.

Herbert agt. Ashturner was a rule to show cause in a suit pending, why applicant should have inspection of the books of the sessions of Kendale.

The application was made in the cause, and the applicant's interest in the inspection was clear.

King agt. Babb, 3 *T. R.*, 580, is in favor of the views of the appellant in this case at bar, as far as it goes; as was also *King agt. Allgood*.

But these were not cases of mandamus, but of rules granted to litigants in a suit pending.

King agt. Lucas, 19 *East R.* 235, was a case of mandamus.

The objection to issuing the writ was that no suit was pending, which objection was clearly invalid and Lord ELLENBOROUGH, C. J., so decided.

But it appears in his answer that the applicant, Searle, claimed certain copyhold lands, within certain manors and applied to the steward of the manor for leave to examine the court rolls.

In this, as in *Rogers agt. Jones*, the object was clear, the interest of the applicant in the inquiry was manifest.

King agt. Shelley, 3 *Term R.* 143, was of the same opinion.

The dictum on *Glover on Corporations* is founded on these cases, and limited as it is to an inspection "on all proper occasions," is right enough.

But the appellant contends that no "proper occasion" existed in the case at bar.

The power granted to the relator in this case goes far beyond any applied for in any of the cases cited.

There the interest of the appellant appeared; the object of the inquiry was patent; the papers sought to be examined were such as contained specified information on the subject of the inquiry.

Here no special interest is claimed to have existed.

The object of the inquiry is not to subserve any private purpose, and no injury can occur from a refusal. The documents which the appellant is commanded to exhibit, are not a special class of documents, but all documents which came into his possession during a certain year.

These documents probably related to many hundred transactions.

The inquiry was not directed as to one or a dozen transactions, but to all.

The action of the court below in this case is reported in 32 *How. p.* 149, and will be drawn into a precedent in future.

It is important that it should be authoritatively settled whether such action was in accordance with the law or not.

A rule on this question is needed.

In order to obtain such a rule, the counsel to the corporation has deemed it advisable that this case should be discussed before the general term of this court, and a decision obtained which will guide public officials in the future.

JOSEPH F. DALY, *for relator, respondent.*

I. The relator claims the right, as a member of this corporation, to see and inspect the papers on file in the street department.

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II. The relator, as a citizen, has a common interest with other members of the corporation, in the matters of which the street department has control, and the papers relating to such matters.

III. The right of the relator, as a citizen, to inspect these papers, rests upon the same basis as every right under our free institutions.

The *res publica*, from which our republican government takes its name, includes every part and item of the commonwealth; and it is a novel doctrine for the street commissioner to maintain that the papers and records relative to the common property belong to the street commissioner exclusively, or that his right to them extends further than their keeping in proper shape for exhibition at all times.

These papers which we call for relate to the public streets, roads and works of this city. We claim an equal right in all; to use the public streets and to inspect the records concerning them. The street commissioner's duties are alike to both: to keep them ready for such use.

The street commissioner, as the agent of the corporation and its members, uses their money to preserve their property, and files his vouchers and evidences of the proper expenditure of such money.

Why are these evidences preserved, if not to be shown when demanded?

What greater or more personal interest can the relator show than that he is a member of the corporation, and that he desires to see the proofs of the proper expenditures of the common money by the common agent?

IV. In England, the right of a member of a corporation to inspect the documents of the corporation, and to have a mandamus compelling the custodian thereof to show them, is well settled (*Wilcock on Mun. Cor.* 349, and cases cited); also, the right of a subject to inspect documents of public proceedings lodged in the custody of public officers (1 *Wiss.* 297; *Id.* 240; 1 *Black's R.* 39; *Rex and King*, 2 *T. R.* 234 and 304); also, the right of a manorial tenant to have a mandamus compelling the lord to exhibit the court rolls and books. (3 *T. R.* 141; 10 *East*, 235, and other cases cited above.)

V. These cases in the English books claim that the relator must show a private right. But if the right be thus far conceded under a monarchical government, surely under our republican government one step further may be taken, and the relator permitted to show as his right the right which underlies our whole fabric of government.

In England, public officers are the masters of the people and the agents of the sovereign. In America they are servants of the sovereign people. The right of the relator is superior to any which an English subject could ever claim.

If this fact is not clearly appreciated by the street commissioner, it is time that the court solemnly declared it.

VI. In respect to the books, records and accounts of the county of New York, the statute has declared such a right in the people, without condition or exception. (1 *Rev. Stat. ch.* 12, *tit.* 2, *art.* 1.)

In respect to public documents of the city of New York, up to the year 1699, the statutes of the state have expressly declared this right, without condition or exception. (*Laws of 1865, ch.* 171.)

There is no reason for making a distinction between the public papers of to-day and those of a century past, or between those of the city and those of the county. And if the legislature has omitted to declare our right in the former, it is simply a defect of police regulation, which the court will remedy by its writ of mandamus, because "in justice and good government it ought to be done." (6 *Bac. Abr. tit. Mand.* 418.)

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At all events, the intent of our law makers is plain, and the court is bound to carry that intent into force.

VIII. The street commissioner offers but two reasons for refusing an inspection of the papers, viz: That it "would involve a serious disturbance of the necessary details of his office, and impede the proper working thereof" That it would require a larger office and a "larger staff than he now employs to secure said records and protect them from loss, injury and mutilation.

We answer to the first, that if we have the right, the showing of such papers is a part of the necessary details and business of his office.

And to the second: 1. That the Revised Statutes of this state, making it forgery, and punishable as such, to tamper with these records, sufficiently protects the public property, as other penal statutes protect private property. (4 R. S. ch. 1, tit. 3, art. 3, §§ 26 and 69.) And that: 2. The danger of mutilation of records is only to be apprehended from persons having private interests in them, and not from a party having the public good in view, as the relator, Mr. Henry, has.

The counsel of the street commissioner, who speaks of the destruction and robbery of public papers which has heretofore occurred, will no doubt readily admit that the criminal must have been personally and pecuniarily interested in the missing documents.

It is least dangerous to entrust them to the investigation of idle curiosity, and even to a person who seeks them with motives inimical to the official who has possession of them; for in the latter case the searcher will be only too solicitous to carefully preserve evidences of delinquency, and the only danger consists in leaving them in the undisturbed possession of the official himself.

The danger apprehended by the street commissioner is too remote to influence the court.

The COURT, on the argument, *reversed* the judgment at special term. No written opinion was given.

COURT OF APPEALS.

GEORGE H. MCINTYRE, Administrator, &c., agt. THE NEW YORK CENTRAL RAILROAD COMPANY.

A *railroad passenger* has a right to a seat in the cars, and it is the duty of the railroad company to provide him with one.

If, in discharging that duty, the company require the passenger to perform an act which is perilous in itself, in passing from one car to another, in a dark night, when the cars are in motion, and in doing which the passenger loses his life, the *negligence, if any*, which that act involves should be imputed to the *company alone*. Thus, where the railroad company, on arriving at a station, in the evening, detached and left the rear car, notifying the passengers therein to go into the next car forward, and after a stoppage of some ten or twelve minutes the cars moved on, when one of the employees of the road, discovering a number of passengers stand-

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ing in the rear car, said, "go forward; there are plenty of seats forward; go forward, if you want seats;" some of the passengers then went forward, among them the plaintiff's intestate, a lady, who undertook to carry a *bandbox*, *bundle*, *basket* and *flower pot*, and in stepping from one car to another, fell between them and was killed:

Held, that the rule that *contributory negligence* will prevent a recovery by the party suffering the injury ought not to be applied to such a case.*

September Term, 1867.

THE plaintiff brought this action, under the statute, as administrator of Mrs. Susannah Knight, deceased, in behalf of her next of kin, to recover damages for her death, alleged to have been caused by the negligence of the employees of the defendants, in November, 1859.

It was proved, on behalf of the plaintiff, upon the trial, that Mrs. Knight, in company with her father, an old man, took the cars of the defendants at Schenectady and proceeded to Syracuse, occupying the rear car of the train. At Syracuse, the car in which they were seated was detached from the train, and they were directed to go forward into the next car. The testimony on the part of the plaintiff was to the effect that they had barely time to reach the next car when the train was started.

* NOTE.—This seems to be a pretty stringent rule to apply to a railroad company, and a very important one for them to know, as similar cases arise or may arise under it frequently. It settles one very important point, to wit: that where, in the night time, the company request passengers, or inform them, that if they wish seats they can find them in another car, the act of the passenger in going to such car is one of peril, and no act of negligence on his part will exonerate the company from damages in making such request or giving such information, in case he is injured.

Thus, it would seem that railroad companies are driven to the alternative of either furnishing one entire car to be used in the night time, in which there shall be seats enough for all the passengers, or if, as now provided with a number of cars, passengers step into one of them where there are no seats unoccupied, the company must remain passive and let the passengers find seats as best they can (although it is the duty of the company to furnish them with seats) by strolling through one, two or three cars, more or less, until they find them; for, if a brakeman happens to come along with a lantern in his hand (as in this case), and is polite enough to inform passengers, who are standing without seats, that by going into another car forward they can find them, the company immediately assumes a perilous risk, and in case of passing from one car to the other, a passenger is injured or killed, either with or without any negligence on his part, the company are liable in damages, under the statute.

Actions for damages in such cases, hereafter, it would seem, need not be submitted to a jury, as there is no question of the plaintiff's negligence to be determined by

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There were no seats in the cars which they entered; and they were directed by a man carrying a lantern, and appearing to be one of the employees of the road, to go forward; that there were seats forward. In compliance with this direction, Mrs. Knight and her father attempted to reach the next forward car, the train being at that time in rapid motion; but in passing from the one platform to the other, she fell between the cars and was instantly killed. It was a dark and somewhat stormy night, a rain or sleet falling and freezing.

It was further proved, on behalf of the plaintiff, that the deceased was under fifty years of age at the time of her death, in vigorous health, and accustomed to earn about a dollar per day by her labor as a seamstress. She left three children, two sons and one daughter; all of them were over twenty-one years of age, and living away from their mother. It was shown that she was in the habit of making articles of clothing, and sending them to her children, from time to time.

On behalf of the defendants, the conductor and brakeman of the train in question testified that the deceased carried a

them, which heretofore has been considered the very gist of the action to entitle the plaintiff to recover; and if there was, probably nine juries out of ten would find there was no negligence on the part of the plaintiff, as was done in the present case, and likewise in the case on the last trial of *Ernst agt. Hudson River Railroad Company*, in which they found a verdict of \$5000 against the company, where the testimony, read in its most favorable bearing to the plaintiff, showed a daring recklessness on the part of the deceased, in endeavoring to cross the railroad, through the palpable warnings and dangers exhibited to him, seldom equalled.

But the general term of the supreme court, in the present case, seems to have had some misgivings in allowing the verdict of the jury for even \$3,500 to stand; and they ordered a new trial, unless the plaintiff would consent to reduce the amount to \$1,500, which was done. Upon what ground this reduction was made the case does not disclose; but it may be inferred, perhaps, from the fact that, notwithstanding the verdict of the jury that there was no negligence on the part of the deceased, the proof showed that she was a woman between forty-five and fifty years of age, of vigorous and robust health, and the court may have concluded that she ought to have been able to carry the contents of a bedroom and greenhouse, which she had with her, without falling through between the cars, the other passengers having passed over safely; but whatever reasons may have influenced the general term to reduce the verdict \$2,000, this court undoubtedly was very willing to affirm it in that shape—REF.

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bandbox, bundle, basket and flower pot, and that her father had a carpet bag; and also that the direction to the passengers to pass into the forward car was made as soon as the train reached Syracuse, where a stoppage was made of some ten or twelve minutes.

The jury found a verdict for the plaintiff for \$3,500, and the special term denied the motion of the defendants for a new trial.

The general term, on appeal, directed a new trial, unless the plaintiff should stipulate to accept a reduction of the verdict.

This the plaintiff consented to do; and from the judgment entered accordingly, for \$2,387.57, the defendants appeal to this court.

O. S. H. HOVEY, *for plaintiff.*

EDWARD HARRIS, *for defendants.*

FULLERTON, J. It cannot be considered negligence on the part of the person killed, that she attempted to pass from one car to another, in obedience to the orders of the defendants. She was not only directed to go forward into another car in the night time, during a storm, and when the train was in motion, but it was necessary for her comfort and convenience that she should do so.

The car to which she was directed to go, when the train stopped at Syracuse, was filled with passengers; and the alternative was presented to her of incurring the risk of the transit, or of remaining standing with an aged parent, whose strength, it may well be concluded, was unequal to such a position. She had a right to a seat, and it was the duty of the defendants to provide her with one.

If, in discharging that duty, they required her to perform an act which was perilous in itself, and in doing which she lost her life, the negligence, if any, which that act involved should be imputed to the company alone.

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The rule that contributory negligence will prevent a recovery by the party suffering the injury, ought not to be applied to such a case.

It would seem to be manifestly unjust to characterize as negligence the act of yielding obedience, under such circumstances, to the requirements of the party inflicting the injury, and to hold as between the parties themselves that it should deprive the party injured of all legal redress.

It would be a novel, as well as a dangerous rule, to hold that a railroad company should enjoy immunity from liability, when the act which occasioned the injury was undertaken under its direction, and was one which the passenger must perform in order to procure the seat which the company was bound to furnish.

I admit that passing from one car to another in a dark and stormy night, when the train was in motion, incumbered with baggage, and having charge of an aged person, was an act fraught with imminent peril, and, if done without sufficient reason, one involving great negligence. But having been undertaken at the request of the company, it is to be regarded as their act, and attempted at their risk.

Unless this view of the case is adopted, railroad companies may be guilty of the grossest wrongs without incurring liability. In performing their contract, they may require a feeble and inexperienced person to incur fearful risks, and then claim to be without fault in law, on the ground that the passenger who may have suffered an injury was negligent in following their reckless directions. The very statement of such a case suggests the necessity of so administering the law as to obviate so great an evil.

There was no error, therefore, in the rulings of the judge who presided at the circuit, touching the negligence of the deceased.

2. There was some slight evidence that the next of kin of the deceased sustained some pecuniary loss by her death. She was, at the time of her death, about fifty years of age,

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industrious in her habits, and in the enjoyment of robust health. It also appeared that she left three children living, who were supporting themselves away from home. She was in constant communication with them, and was in the habit of making and sending to them some articles of clothing. It cannot, therefore be said that her children had no pecuniary interest in her life, even if that term is used in its most limited signification. The extent of that interest was a question for the jury, and was fairly submitted to them on the evidence.

When we consider the defect which the statute was designed to remedy, it is taking too narrow a view of the matter to say that the word *pecuniary* was used in so limited a sense as to embrace only the loss of money.

Such a limitation would be, in many cases under the statute, a mere mockery, because it would afford no substantial relief in the very cases in which it is most needed.

The loss of the society of a deceased relative, the injury to the affections of those surviving, cannot be regarded as being within the remedy of the statute, because in no sense can the loss be regarded as pecuniary. But to children the loss of a parent involves the loss of many other things which this court has heretofore regarded as of a pecuniary character, and as the subjects of consideration by a jury in assessing the damages under the statute. (*Tilley agt. Hudson River Railroad Co.* 24 N. Y. R. 471.)

It is true that these children were away from home, probably were of full age, and not immediately dependent upon their mother for support. But the evidence also shows that they were not beyond the reach of a mother's care and bounty. Out of her earnings, insignificant as they were proved to be, she provided small articles of clothing for them, and the jury had a right to find that her death involved them in a pecuniary loss.

The statute under consideration has presented some difficult questions of construction; but the courts have taken a

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humane view of them, and have endeavored to effectuate what may fairly be presumed to have been the intention of the legislature in providing a remedy unknown to the common law. It would not, therefore, have been proper for the judge to have instructed the jury, as he was requested to do, that the plaintiff was entitled to recover only nominal damages.

There is no precise rule which a jury can adopt in estimating such damages.

The question should always be left, as it was in this case, to their judgment upon the whole case; and when the question has been fairly submitted, and the damages are not excessive, their verdict should not be disturbed.

It follows, from these views, that the exceptions to the judge's charge were not well taken, and the judgment should be affirmed.

DAVIES, Ch. J. Upon the trial of this action the following facts appeared: On the 14th day of November, 1859, Mrs. Knight, the plaintiff's intestate, started from Rutland, Vermont, in company with her father, to proceed west into the State of Pennsylvania.

They took the defendants' car at Schenectady, and proceeded thereon to Syracuse.

On arriving at that place they were seated in the rear car of the train, which the employees of the defendant there determined to detach from the train and leave at that place.

That it was so to be left was announced by the brakeman to the passengers in that car, and they were requested by him to leave it and go into the forward cars.

The passengers immediately left that car and went into the one next forward of it.

The train started about the time the passengers got into this car, and there being no seats in it unoccupied, the passengers were compelled to stand, and were standing in the aisle of the car. At this time, and after the train had started,

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an employee of the defendant came into the car, with a lantern in his hand, and said: "Go forward; there are plenty of seats forward; go forward, if you want seats."

Some of the passengers then went forward while the cars were in motion, and among them was the deceased.

Mrs. Knight, in stepping from one car to another, either did not step far enough, or her feet slipped, and she fell between the cars and was killed.

It was a dark night, and it did not appear that any of the employees of the company were aiding or assisting the passengers in their passage from one car to the other.

Testimony was given of the age and circumstances of the deceased.

She was between forty-five and fifty years of age and lived with a married daughter, who had a family of children. She also left two sons, who were of full age.

The jury gave a verdict for the plaintiff, finding the damages at \$3,500; and on appeal to the general term, that court ordered a new trial, unless the plaintiff would remit \$2,000 of the verdict and leave it to stand for the sum of \$1,500, which the plaintiff did, and judgment was entered for the latter sum, with interest; and from which judgment, as so modified and entered, the defendants appeal to this court.

It is now urged by the counsel for the appellant that there was evidence that the negligence of the deceased contributed to the injury, and that consequently there can be no recovery; and he insists that that was a question for the court to decide, and that it was error to leave to the jury the question of the plaintiff's negligence or contributory negligence.

There was much evidence tending to show that, in moving from the one car to the other, the deceased was but obeying the directions of the employees of the defendants; and it was eminently proper for the judge to have left to the jury the question whether, under the circumstances disclosed, the deceased was guilty of any negligence in complying or

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attempting to comply with those directions. The learned judge properly told the jury that they could judge whether it was safe for a woman to travel with her incumbrances on such a night as that is represented to have been; and they could judge, too, whether it was right and proper for her, in order to get a seat, to undertake to pass from one car to another. That the jury could judge whether it was reasonable and proper for her to rely upon the directions of a man appearing to be in his place as an employee of the company. And he further instructed the jury that, if it was negligent for Mrs. Knight to follow the directions of this man with the lantern, it must have been such negligence as contributed to her death. The jury, by their verdict, have announced that it was not negligent for the deceased, under the circumstances, to follow the directions of the man giving the same.

The court could not say, as matter of law, that it was negligence on the part of the deceased to follow that direction; and whether there was negligence or not, was therefore properly left to the jury; and they have responded that that there was no negligence on the part of the deceased, and that settles this question.

I am unable to discover any error in the charge of the judge in reference to the damages which the plaintiff was entitled to recover. At the request of the defendant's counsel, the judge charged the jury that the burden of proof is upon the plaintiff to prove the pecuniary injury, and such facts as could enable the jury to determine what would be a fair and just compensation, with reference thereto, to the next of kin, to entitle the plaintiff to recover more than nominal damages. And also, that the jury had no arbitrary discretion in regard to the amount of damages, but must be governed by the weight of evidence as to what would be a fair and just compensation, with reference to the pecuniary injuries sustained by the next of kin.

These directions were in strict accordance with the doctrine as laid down by this court in the case of *Tilley* agt.

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Hudson River Railroad Company (24 N. Y. 471, and S. C. 29 N. Y. 252).

That portion of the judge's charge on this subject, to which exception was taken by the defendant's counsel, was also in harmony with the opinion of the court in the case last cited, and is but a reiteration of the doctrine there enunciated.

He there said: "The jury are to give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death. They are not tied down to any precise rule. Within the limit of the statute as to amount, and the species of injury sustained, the matter is to be submitted to their sound judgment and sense of justice. They must be satisfied that pecuniary injuries resulted. If so satisfied, they are at liberty to allow them from whatever source they actually proceeded which could produce them. If they are satisfied, from the history of the family, or the intrinsic probabilities of the case, that they were sustained by the loss of bodily care or intellectual culture, or moral training, which the mother (in that case) had before supplied, they are at liberty to allow it. The statute has set no bounds to the sources of these pecuniary injuries."

The charge of the judge to the jury, in the present case, is unobjectionable, in the light of this authority.

Upon the trial, a witness was asked: "At the time of the death of the deceased, what was she capable of earning?" This was objected to by the defendant's counsel, on the ground that it was not competent on the question of the worth of this woman's life to the next of kin.

The court overruled the objection, and the defendant's counsel excepted.

It does not appear that the question was answered.

The witness was then asked: "And what did she usually earn?"

This was also objected to on the same ground; and the



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objection was overruled, and an exception taken. The witness answered: "Her services commanded readily at that time, at least one dollar per day in addition to her board." It is now urged that both of these questions were improper, as calling for the opinion of the witness.

It is a sufficient answer to say that no such objection was taken upon the trial. And if taken as applicable to the first question put, it is now wholly immaterial, as that question was not answered. And such an objection could have no pertinency in reference to the second question.

This question does not call for any opinion, but for a fact, "What did she usually earn?"

This was a material and important inquiry, in forming an estimate of the pecuniary loss sustained by the next of kin, by the occasion of the death of the deceased.

Upon the authority of the case of *Clark* agt. *Vorce* (15 *Wend.* 193), the judge committed no error in allowing the notes of the testimony of the witness Seeley (who had in the meantime died), taken by Mumford upon the former trial, to be read in this trial.

In that case the witness testified that, on the former trial, he acted as counsel for the defendant, and took very full and particular minutes of one Haight's testimony; that he intended at the time to take down the words of Haight, but could not pretend to give his precise words; that he could not swear to Haight's testimony, except from the minutes taken by him on that trial, and could not now testify that he had taken down every word of his testimony; but he intended, at the time, to take down all he regarded as material.

The supreme court thought the testimony should have been received. Ch. J. SAVAGE observed: "There are few or no cases where a cautious and prudent man will swear that his notes of testimony of a witness, taken down at the time, contain his very words and all his words."

In *Huff* agt. *Bennett* (2 *Seld.* 337) the learned judge who presided at the trial of this action, and admitted the notes of

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Seeley's testimony, in delivering the opinion of the court, said: "The case of *Clark agt. Vorce (supra)* was very different from this case. The witness says he cannot swear that his minutes contained the testimony of Scott accurately, and that he may have omitted things that he testified to. He does not say he believes his minutes are correct, nor that he intended to take down the words of the witness."

In the present case, the plaintiff called one of the counsel of the defendant to prove the testimony given by the witness Seeley, on a former trial of this action, he having since that trial died. He testified that he was one of the counsel for defendant in this action; was present at the former trial, and took notes of testimony; he had them there in court. He says: "So far as I took minutes, I took them as given by the witness, so far as I could; I designed to take the substance of the testimony as given by the witness, and presume from that I have; I have no recollection of the testimony aside from what I have here."

On his cross-examination he said: "Should judge that it was not possible for me to take the whole testimony *verbatim*; did not aim to take more than the substance; do not say that I have the whole language of the witness, nor the whole of his testimony." In response to the court, the witness said: "I have no recollection of the witness or of the testimony; not the slightest whatever; I have his testimony on my minutes, and presume it is the substance of his testimony."

The plaintiff's counsel then offered to read the evidence of Austin H. Seeley, as given upon the former trial, as shown by the notes of testimony taken by the witness. The defendant's counsel objected, on the ground that it did not appear that the whole of the testimony was taken, or that the testimony as given was taken down, and that the necessary preliminary proof of the accuracy of the notes had not been made.

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The court overruled the objection and admitted the evidence, to which the defendant's counsel duly excepted.

When it is observed that the witness called upon to prove the accuracy of his notes was manifestly an unwilling witness, it cannot fail to be seen that his whole testimony, when taken together, comes fully up to the doctrine of *Clark agt. Vorce (supra)*.

There was no error, therefore, in the admission of the notes taken by Mumford of Seeley's testimony.

It follows that the judgment must be affirmed.

All concur.

Affirmed.

N. Y. SUPERIOR COURT.

FREDERICK BURNHAM agt. THOMAS C. ACTON AND OTHERS.

The ninth section of "An act relating to the metropolitan board of health, and to the duties and powers of the commissioners of said board and the salaries of their subordinates, passed in 1867, provides as follows: "No preliminary injunction shall be granted against the metropolitan board of health, or of police, or its or their officers, or against the commissioners of said board in their capacity as a board of excise, or against the last named board, except by the supreme court, at a special or general term thereof, after service of at least eight days' notice of a motion for such injunction, together with copies of the papers on which the motion for such injunction is to be made."

Held, that this is a *public*, and not a private or local law, and therefore, not exposed to the constitutional objection of containing other subjects than those expressed in its title.

The act creating the metropolitan sanitary district is, essentially, a *penal* law, and therefore is a *public* act.

This act of 1867, being constitutionally valid, it deprives this court of jurisdiction to hear any motion for an injunction against the boards and officers named in it.

Special Term, April, 1868.

THIS was a motion for an injunction *pendente lite*, restraining the defendants, the commissioners of police, from placing policemen upon the sidewalks in front of the plaintiff's auction store, for the purpose of warning persons from entering therein.

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A preliminary objection was taken by the defendants to the jurisdiction of this court, founded upon the ninth section of the act entitled "An act relating to the metropolitan board of health, and to the duties and powers of the commissioners of said board and the salaries of their subordinates," passed in 1867 (*Sess. Laws* 1867, p. 2410), which ninth section is as follows: "No preliminary injunction shall be granted against the metropolitan board of health, or of police, or its or their officers, or against the commissioners of said board, in their capacity as a board of excise, or against the last named board, except by the supreme court, at a special or general term thereof, after service of at least eight days' notice of a motion for such injunction, together with copies of the papers on which the motion for such injunction is to be made."

R. D. HOLMES and C. S. SPENCER, *for plaintiff*.

A. J. VANDERPOEL, *for defendants*.

MONELL, J. The superior court of the city of New York has general power, under the jurisdiction conferred upon it by the thirty-third section of the Code of Procedure, to grant the relief demanded by the plaintiff in this action, unless it is deprived of such power by the provisions of the act above referred to. Such court was created by the legislature, and derives all its jurisdiction and powers from that body. Those powers and jurisdiction can at any time be enlarged or diminished by the legislature. If, therefore, that part of the ninth section of the act referred to which relates to the defendants in this action is valid, there can be no doubt, I think, that this court is not allowed to entertain this motion.

The act creating a metropolitan sanitary district and board of health was passed in 1866 (*Sess. Laws*, p. 114), and the act of 1867, which contains the section I have quoted, is in aid of and additional to the former act, and in its effect is to be regarded *in pari materia*.

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The title of each of the acts expresses but a single subject, and that relates to the board of health. The board of police is not named in the title; and any provisions which relate to any subjects other than such as are expressed in the title, are void, under the sixteenth section of the third article of the constitution, if the act is a private or local law.

I do not think it necessary, on this motion, to determine whether the provision which limits jurisdiction to the supreme court, so far as it relates to the board of police, is a different subject from such as is expressed in the title of the act. There is another ground, which, in my judgment, must control the decision.

The constitutional provision is confined to *private or local laws*, and has no effect whatever upon any provision contained in a *general* statute. Such latter statutes may embrace as many and as incongruous subjects as the legislature may see fit to include in them.

Nor do I find any difficulty in applying the limitation of jurisdiction, as contained in the section referred to, to the board of police and its officers. They are expressly named; and I can find no reason for supposing that the legislature did not intend to confine applications for injunctions against such board and officers to the supreme court. If the act is a general statute, its title was of no consequence; and it would be quite as valid if it had no title whatever. Such statutes require only an enacting clause (*Constitution, art. 3, § 14*).

An examination of the statute under consideration has satisfied me that it is a public, and not a private or local law, and, therefore, not exposed to the constitutional objection.

I recently examined this question in the case of *Brets agt. The Mayor, Aldermen, &c. of New York*, and there pointed out the distinction between general and private statutes (see *N. Y. Transcript of April 11, 1868*). I then endeavored to show that statutes local in one sense, may nevertheless be

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in some cases general statutes; and that it was not necessary to render a statute a public act, that its provisions should be equally applicable to all parts of the state. It was enough if they extended to all persons doing or omitting to do an act within the territorial limits described in the statute. Another distinction which I pointed out was, that all statutes which are of a penal nature are public laws, although they may be limited in their operations and effects to particular localities or parts of the state. I referred to several cases in support of these distinctions (*Pierce agt. Kimball*, 9 *Greenl. R.* 54; *Burnham agt. Webster*, 5 *Mass. R.* 266; *Jenkins agt. Union Turnpike Co.* 1 *Caines' R.* 86; *Bank of Utica agt. Smedes*, 3 *Cow. R.* 684; *White agt. Syracuse & Utica Railroad Co.* 14 *Barb. R.* 559; *Herisdia agt. Ayres*, 12 *Pick. R.* 344).

These cases abundantly establish that all local laws which are either penal in their nature, affecting all who offend their provisions, and all remedial statutes, where all persons may come within their purview, are general and not private laws.

The act creating the metropolitan sanitary district is essentially a penal, and, therefore, a public act.

A brief examination will establish this. It provides that any person omitting to keep a registry of births and deaths shall be liable to a fine of ten dollars. The police may arrest any person who shall violate any act or thing forbidden by any law or ordinance of the board of health, which offense is declared to be a misdemeanor. Courts may punish for contempt, and enforce obedience of the orders of the board. The board is authorized to make such bylaws, rules, and regulations as it may deem advisable for the protection of life and health, which bylaws may be enforced by a penalty not exceeding fifty dollars for each offense. And generally the act provides that whoever shall violate any of the provisions of the act, or any order of the board, or any bylaw or ordinance thereof, or shall obstruct or interfere with

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any person in the execution of any order of the board, or any order of the board of police, or wilfully omit to obey any such order, shall be guilty of a misdemeanor, and be liable to be indicted and punished for such offense.

The general scope and purpose of the act is to protect the public life and health, and a very large portion of the powers conferred upon the board to carry out the objects of the law are of a mixed magisterial and police character; and although limited in their functions to a fractional part of the state, affect all persons who offend its provisions, or are brought within its purview. The board of health is comprised in part of the police commissioners, which commissioners, in their capacity of police officials, are directed to co-operate with and assist in enforcing obedience to the orders and ordinances of the board of health, and to cause the arrest of all offenders.

In these large and general powers, which are so liberally and properly given to the board of health, all the people of the state are interested, to the extent at least, that all the people are affected more or less by the sanitary condition of this vast and populous city. So all the people of the state are amenable to the provisions of the law, and may be subjected to its penalties.

In determining that the act under consideration is a penal statute, whose penalties reach all persons, whether inhabitants of the metropolitan district or otherwise, I have disposed of the only objection to its validity; and it follows, under the competency of the legislature to deprive this court of any of its jurisdiction, that the motion for a temporary injunction cannot be sustained.

The suggestion that this was a motion for a permanent or perpetual, and not for a temporary injunction, and, therefore, not within the letter of the statute, has no force. All injunctions are temporary which are *pendente lite*. Permanent injunctions can be obtained only by a judgment of the

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court after a trial of the action (1 *Barb. Ch. R.* 613; *Code*, §§ 219, 220, 221).

The motion must be denied, with \$10 costs.

SUPREME COURT.

EDMUND J. POWERS agt. JOHN SHEPARD.

The first seven sections of the act of 1865, chapter 29, providing for state bounties to volunteers in the army and navy, &c., the 3d and 4th sections of which provide for and prohibit a sum not exceeding \$600 to be paid for each three years volunteer, became a law and *took effect immediately on its passage*, Feb. 10th, 1865, as declared in the act, and continued in force, notwithstanding the provisions of chapter 41 (*Laws of 1865*), passed on the 24th February, 1865, which re-enacted the same seven sections contained in chapter 29, and declared, "*this act is hereby declared to be a law from the time of its passage; but it shall not take effect until after the canvass of the votes by the board of state canvassers next after the general (next November) election.*" (INGRAHAM, J., dissenting.)

Consequently, an agreement made on the 21st of March, 1865, to pay \$830 for each of such volunteers for three years, is void, as being in violation of chapter 29.

The *fourth section* of said chapter 29, prohibiting a larger sum than \$600 to be paid for the three years volunteers, is *not unconstitutional*. (*Overruling the decision S. C. at special term, 30 How. 8.*)

New York General Term, May, 1867.

Present, Hon. W. H. LEONARD, P. J.; D. P. INGRAHAM and JAMES C. SMITH, Justices.

MOTION by plaintiff for judgment on a verdict rendered in his favor, subject to the opinion of the court at general term.

The case proved is briefly this:

In March, 1865, the defendant was the supervisor of the town of Sparta, in the county of Livingston, and, as such, was engaged in raising recruits to fill the quota of that town, under the call for men for the army and navy of the United States, issued by the president on the 19th of December, 1864, or the next call thereafter. For that purpose, he entered into an agreement, in writing, with the plaintiff, dated at Jersey City, the 9th of March, 1865, by which he, as such supervisor, authorized the plaintiff to recruit and fur-

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nish for the defendant, and for his said town, seventeen three years naval recruits, or the credit of the same duly made, for each of which he agreed to pay the sum of eight hundred dollars.

On the 21st of March, 1865, he made a second agreement, indorsed upon the first, by which he undertook to pay the plaintiff, for furnishing the recruits provided for in the first agreement, the additional sum of eight hundred and fifty dollars, besides the amount mentioned in said first agreement.

The plaintiff furnished the number of men provided for between the 21st and 25th of March, and the defendant paid the sum stipulated in the first agreement.

This suit is brought to recover the additional sum of eight hundred and fifty dollars, under the second agreement.

On the trial, the defendant moved to dismiss the complaint, on the ground that the contract sued on is void, and is in violation of the laws of this state, and particularly of chapter 29 of the laws of 1865, and of the fourth section of that act.

The motion was denied, and the defendant's counsel excepted.

IRA D. WARREN, *for plaintiff.*

S. T. FREEMAN, *for defendant.*

JAMES C. SMITH, J. It is insisted upon, by the defendant's counsel, that the agreement sued on is in violation of the fourth section of chapter 29 of the laws of 1865. The first three sections of the statute referred to provide for the payment of a state bounty to volunteers furnished from this state, as in said act provided, in order to fill the quota of the state, under the call of 19th December, 1864, and also under any subsequent call during the war then existing, such bounty not to exceed the sum of six hundred dollars to a volunteer for three years, four hundred dollars to one for two years, and two hundred dollars to a volunteer for one year.

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The fourth section provides that no city, county or town shall thereafter borrow or raise money for paying bounties to volunteers under said call or any subsequent call, otherwise than as is provided in the seventh section of said act, and not to exceed one hundred dollars for hand money and incidental expenses for procuring such volunteer; nor shall any city, county or town, or any individual, or any individuals, pay any money for such purpose or purposes, otherwise than as is in said act provided (except that an individual may in any way hire a substitute, to exempt himself from draft).

The seventh section amends section 22 of chapter 8 of the laws of 1864, which in its original form authorized the raising of money upon the credit of towns and counties, for the purpose of paying local bounties to volunteers. By the amendment, a proviso was added, to the effect that the bounties raised, paid or offered, under the provisions of that section, shall not exceed in amount the state bounties provided for by said act of 1865. One of the objects specified in the time of the last mentioned act is "to prohibit any local bounties to volunteers," drafted men or substitutes.

The intent of the prohibitions and restrictions contained in section four seems clear. They were designed to prevent the serious mischiefs resulting from an unrestricted competition between different localities in respect to bounties, which we may know judicially, as matter of public history, were widely and severely felt by the people of the state, before the passage of the act referred to. Under the stimulus of such competition, extravagant local bounties were offered and paid on every hand, and an enormous load of debt and taxation was about to be rolled up, to be borne by the people of the towns and counties upon whose credit it was incurred; and this very extravagance of expenditure tended to defeat the object of offering bounties, and to impede the recruiting of the army, by appealing without stint to the cupidity of men, and inducing them to delay volunteering, in the hope of getting a still larger bounty at a later day.

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The act in question intended directly to repress these mischiefs.

The plaintiff's counsel argues, in view of the peculiar language of the restriction, that it was not intended to limit the *amount* to be paid for bounties. The language is, "Not * * * * pay any money * * * * *otherwise* than is herein provided;" and this, it is urged, does not restrict the amount. The idea is naturally suggested by the form of expression used, which is not apt, but obviously such is not the meaning. If the restriction does not relate to the amount, it can only refer to the *mode* of raising money for bounties; and it applies in terms to individuals, as well as to towns and counties. But under section 22 of the act of 1864, individuals could not raise money in the mode prescribed by that section, and towns and counties could not raise it to pay bounties in any other mode. So that, upon the plaintiff's construction, the restriction would be inapplicable to individuals, and nugatory as to towns and counties. Besides, it would not meet any of the mischiefs already adverted to. The construction contended for by the plaintiff's counsel is not aided by the circumstance that the last clause of the section four expressly declares void all acts of counties, towns and cities, in contravention of the provisions of that section, and does not declare void the acts of individuals violating those provisions. That clause is declaratory merely. As the officers referred to had power, under section 22 of the act of 1864, to raise money, in the mode thereby provided, to pay bounties to an unlimited amount, and would continue to have the same power within the limits fixed by section four, it was expedient, if not necessary, to declare expressly that the exercise of such power in excess of the prescribed limits would be void; but such declaration was not needed, in respect to the acts of individuals, as they derived no power from the former statute, and their acts in violation of the latter statute would be void without an enactment to that effect, by force of the common law. (1 *Kent*, 518.)

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The plaintiff's counsel also claims that the agreement in suit is not within the prohibition of the act, as it does not provide for the payment of any sum whatever to a volunteer. But it requires the payment of a stipulated sum to the plaintiff, in consideration of his procuring a certain number of volunteers to the credit of the plaintiff's town, and the sum stipulated by the contract exceeds the rate of six hundred dollars for each man. By the contract, the plaintiff becomes a middleman, or recruit broker. It enables him to go into the market and pay sums exceeding the amount fixed by the law as bounties for volunteers, and retain a liberal profit to himself. That was the actual result in the present case. According to the testimony of the plaintiff himself, he paid eight hundred and thirty dollars for the men; not to the men themselves, but to the men who shipped them. If the transaction is valid, the statute is a dead letter. The agreement is just as obnoxious to the policy of the act as if it had stipulated that the sum expressed should be paid directly to the volunteers. It has the same tendency to create and foster the unhealthy competition which the statute has intended to suppress. It is an attempt to evade the statute, and consequently it is void, if the statute is valid.

This brings us to the consideration of the other positions taken by the plaintiff's counsel. First, that the restriction in section four is unconstitutional; and secondly, that it did not take effect until after the agreement sued on was made.

Respecting the constitutionality of the act, no question could have been entertained, but for the opinion delivered by the learned judge who decided this case at special term, on a demurrer to the complaint. (1 *Abb. R. N. S.* 129.)

He held the act unconstitutional, and placed his decision upon the ground that the legislature have no power to prescribe to the citizen what price he shall pay to the substitute in the army. It will be observed, however, that the act expressly permits an individual to hire a substitute in any way, to exempt himself from draft. It restricts individuals

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only so far as is necessary to prevent the mischief at which the act was aimed. With all due respect, I conceive that the power of the legislature to adopt such restriction cannot be successfully questioned. The measure is clearly within the exercise of their undoubted power to provide for raising men to fill the quota of the state.

The remaining question is, whether section four of the act took effect before the agreement in the case was made.

The agreement is dated the 9th of March, 1865. The act (chapter 29) was passed the 10th of February preceding, and it expressly provided that each of its sections should take effect immediately, except the eighth, ninth and tenth. Those sections authorized the creating of a state debt not exceeding thirty millions of dollars, for the purpose of raising means for the paying of bounties provided for by the act, the bonds of the state to be issued to obtain the money, and the debt to be paid by tax, the interest annually, and the principal in eighteen yearly instalments. The eleventh, twelfth and thirteenth sections provided for submitting the question of the debt to the people at the next general election.

On the 24th of February, 1865, the legislature passed another act, entitled "An act to provide for filling the quota of men required from this state for the army and navy of the United States," and to amend section 22 of chapter 8 of the laws of 1864, and to regulate local bounties to volunteers, drafted men or substitutes (chapter 41). The act consisted of eleven sections. The first seven were a transcript of the first seven sections of the act of February 10. The eighth appropriated not exceeding thirty millions of dollars, for the purpose of paying the bounties provided for in said act. The ninth provided that a state tax be levied, not exceeding two per cent per annum, to be devoted to restoring to the treasury the money so appropriated; and the tenth section authorized the comptroller to anticipate such tax by borrowing from any fund in the treasury, upon the credit of the general fund, the necessary sums to carry out the provisions

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of the act. The eleventh section furnishes the key to the construction of the two acts, and in these words: "This act is hereby declared to be a law from the time of its passage; but it shall not take effect until after the canvass of votes by the state canvassers next after the next general election; and if it should then appear at such canvass that a majority of the votes cast at such election, upon the question of creating a state debt for the purpose of raising money to pay bounties, for the purpose of filling the quota of men called for from this state, under the said call of December 19th, 1864, passed February 10th, 1865, has been against creating such a debt, then the said board of state canvassers shall at once, upon completing such canvass, certify that fact in writing to the governor, and the governor shall at once, upon being so certified, issue his proclamation declaratory thereof, and from the day of issuing such proclamation this act shall take effect. But if, on making such canvass, it shall appear that a majority of the votes cast upon the said question have been for creating the said debt, then the said board of state canvassers shall at once, in writing, certify that fact to the governor, and the governor shall at once, by proclamation, make public such result; and this act shall not then take effect until after the adjournment of the next legislature."

The first seven sections of the two acts being in precisely the same language, the plaintiff's counsel argues that the provisions of the latter act that those sections shall not take effect until after the canvass, or till after the next session of the legislature, as the case might be, was an implied repeal of the provision of the first act that they should take effect immediately. The construction is ingenious, but I think it is not sound. The two acts had a common object, to wit, to raise moneys to pay bounties for the purpose of filling the quotas of the state, but their modes of accomplishing the object were entirely different. The plan of the first was to provide for raising the money by creating a state debt under the 12th section of the 7th article of the constitution, which

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requires a submission to the people. The scheme of the second act was to provide for the contingency of a failure to obtain the requisite vote to ratify the plan of the first act, by appropriating from the state treasury the sum needed for bounties and levying a tax of two per cent, to be applied to restoring in part the sums so appropriated. The latter act did not contemplate or require the repeal, suspension, or abandonment of the former; on the contrary the former was to be tried, and if ratified by the people, it was to be carried out. Here, then, were the two distinct plans, of each of which the first seven sections referred to were a part. As a part of the plan created by the first act, they were to take effect immediately after its passage, but as a part of the plan of the latter act, they were not to take effect till after the canvass. As a part of chapter 29, they had at once, and continued to have, the same effect, in all respects, as if chapter 41 had not been enacted. This is made more apparent by chapter 56 of the laws of 1865, passed February 27th, which provides among other things, that a state tax of two per cent be levied for the next fiscal year, to raise means to pay the bounties directed to be paid by chapter 29, and authorizes the comptroller to issue bonds of the state in anticipation of the said tax, for the purpose of raising the money required for such bounties without delay, and also directs that if chapter 29 be approved by the people at the next election, said tax shall not be collected, and said bonds shall be paid from the proceeds of the stocks authorized by chapter 29.

The plaintiff's counsel claims further, that the effect of chapter 29 is postponed by the operation of its own section 11, which provides "*that this act shall be submitted to the people on the next general election.*" The argument is that the entire act is submitted, and therefore the effect of the whole is postponed till the result of the election is declared. The true construction of these words is that only so much of the act is submitted as provided for the debt proposed to be created. That is all that it was necessary to submit to ac-

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comply with the object of the act, and it is all that the legislature could properly submit to the people (*Barto agt. Himrod*, 8 N. Y. R. 483). This construction makes sections 11 and 14 of chapter 29 consistent with each other, as to the time when the different provisions of the act shall take effect.

It may also be remarked that the provisions of section 4 of chapter 29 may stand alone even if all the other parts of that act fail. The limitations which it imposes upon local bounties have no necessary connection with the plan to create a fund for a state bounty.

For these reasons, I am of the opinion the defendant is entitled to judgment on the verdict.

LEONARD, P. J. If it be held that section 11, chapter 41, of the laws of 1865, suspends the operation of chapter 29 of the same session, then the latter chapter will become nugatory; as it will be seen, that in case the people voted against the loan, chapter 41 then came into operation; and should not the vote be for the loan, the same chapter was also to take effect at a future period; the governor, in either case, having first issued his proclamation declaratory of the result. Whichever way the vote resulted, chapter 41 would eventually become operative; and if chapter 29 be suspended in the meantime, the seven sections which were identical in the two chapters would never necessarily have any operation under the suspended act. This construction is equivalent to holding chapter 29 to have been repealed.

The existence of chapter 29 could not have been overlooked by the legislature, when the latter act followed the former by the lapse of two weeks only. Nor is it probable that the repeal would have been left as the result of a legal implication, had such been the intention of the legislature.

It is argued by my brother judges in this case, and I concur, that the identity of the first seven sections of the two chapters does not affect a repeal of those sections in the first act.

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That the first act was not to become inoperative according to the legislative intention, is further confirmed by the enactment of chapter 56 by the same legislature on the 27th of February, a few days later only than the date of chapter 41, which was declared to be a law from the time of its passage, although the period when it was to go into effect was postponed.

Chapter 56 contemplates the payment of bounties directed by chapter 29, and provides for raising the money temporarily for that purpose by the comptroller, to be redeemed from the proceeds of a direct tax of two per cent, or from the the proceeds of the loan, in case the people accepted that plan as proposed by chapter 29.

The construction that holds chapter 29 to be suspended leaves no authority in force until several months have elapsed (the election of the following November) for the payment of bounties by the state; and thus the operation of a subsequent enactment (chap. 56) is also suspended, so far as it contemplates an immediate expenditure of money from the treasury for that purpose.

These views make it entirely clear to my own mind, that it was the intention of the legislature that chapter 29 should be considered in full force, notwithstanding the enactment of chapter 41.

The declaration that chapter 41 is a law from the time of its enactment, also favors, in some degree, this construction, inasmuch as it would otherwise be inconsistent that similar provisions, contained in a former chapter, should be in operation as a law during the period when, by chapter 41, they were not to take effect.

The conclusion is thence derived that the contract sought to be enforced by this action, contravened the provisions of chapter 29 forbidding the payment of bounties above the prescribed amount, and is therefore void.

The point that the contract is not with a volunteer nor for the payment of bounties, is not available. The policy of

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the law is destroyed by permitting contracts for procuring volunteers by the payment to any one of an amount beyond the sums prescribed by the act for bounty and hand money.

The defendant is therefore entitled to judgment upon the exceptions.

INGRAHAM, J. *dissenting*. In 1865, the defendant being supervisor of Sparta, in Livingston county, New York, made an agreement with the plaintiff to pay the plaintiff for each of seventeen three years naval recruits, which he should recruit and furnish for defendant and his town, the sum of eight hundred dollars. This agreement was signed by the defendant and dated 9th of March, 1865.

The plaintiff furnished the recruits between the 21st and 25th of March, 1865.

On the 21st of March, 1865, the defendant made another agreement to pay the plaintiff the additional sum of eight hundred and fifty dollars, in consideration of the rise in the price of three years volunteers.

The plaintiff paid for each recruit eight hundred and thirty dollars to those who shipped them, not to the recruit.

This action is brought to recover eight hundred and fifty dollars under the last contract.

Upon the trial the defendant moved to dismiss the complaint, upon the ground that the contract was void and in violation of the provisions of an act of the legislature. The motion was denied and the defendant excepted.

The court directed a verdict for the plaintiff, subject to the opinion of the court at general term.

There is nothing in the contract itself to impair its validity, and the only ground upon which it is claimed that the contract is void, is that it is in violation of the provisions of the law of 1865, chapter 29.

The act of the legislature referred to provided for a payment by the state of the sum necessary to procure volunteers, and authorized the issue of stock for that purpose.

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It also provided, in the 3d section, for the payment to each volunteer of six hundred dollars if he enlisted for three years, and a less sum for a shorter term of service.

In the 4th section, any city, county, or town, or any individual was prohibited from paying any money for such purposes, otherwise than as therein provided, and no city, county, or town could borrow or raise by tax any money for the purpose of paying bounties, &c., except as provided in section 7 of the act, and not to exceed one hundred dollars for hand money and incidental expenses for procuring each volunteer.

The 7th section authorized the board of supervisors to raise money for the purpose of paying bounties and paying the incidental expenses, and limited the amount to be raised to six hundred dollars for three years men, and lesser sums for shorter terms.

It was also provided for submitting to the people this act for their approval, and the last section directed that the 3d, 4th, 5th, 6th and 7th sections should take effect immediately, but the 8th, 9th and 10th sections (providing for a loan) should not become a law until ratified by the people.

On the 24th of February of the same year (chap. 41) the legislature passed another act containing these sections in the same words as in chapter 29 with other provisions, and providing for the submission to the people of the last act, and containing in the 11th section the following provisions, viz, that the act should be a law from the time of its passage, but should not take effect until after the canvass of the votes after the next general election; that if it should appear at such canvass that a majority of the votes cast were against creating the debt, the state canvassers should so certify to the governor, who was to issue his proclamation, and the act should take effect from the day of issuing the proclamation. If a majority of the votes were for creating the debt, the same was to be certified as before, but the act should not take effect until after the adjournment of the next legis-

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lature. Or in other words, if the people did not approve of creating the debt the act should take effect at once; and if they did approve of such a debt, then the act should not take effect until after the session of the next legislature.

Under either provision, however, this act was not in force at the time of the making this contract, and its provisions have no effect thereon. There is nothing in the act directly repealing the former act (chap. 29), and the mere re-enactment of the provisions of that act cannot be construed as a repeal thereof.

We are therefore left to decide this case upon the provisions of chapter 29, so far as they were in force at the time the contract was made, unless the 11th section of the act chapter 41 is to be construed as suspending the operation of the sections of chapter 29 incorporated in them.

That section provided that none of the previous sections should in any event take effect until after the November elections; that is, that the provision therein limiting the amount to be paid to a volunteer and for hand money, and which was in fact the same provision as was contained in section 4 of chapter 29, should not take effect until after the November election. I think the fair construction of this section is that the legislature intended that this section, and the enactments contemplated therein, should be suspended until after the people voted thereon. The object of submitting it to the people was to obtain their assent to a loan, and unless such loan was obtained it was not deemed advisable in that act to restrain the payment of any sum to obtain volunteers until after the vote of the people. If, notwithstanding, it should be held that the act chapter 29 was in force, it would be in conflict with the provisions of the 11th section of the 41st chapter, and would render nugatory the provisions suspending the operation of the same section as contained in the latter act.

The two acts must be read together, and effect given to the provisions of both as if they were incorporated in one

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act, and in such a manner as not to render either a nullity. Such a result can be obtained by holding that these sections in the act, chapter 29, which were incorporated in the act chapter 41, and then re-enacted, are controlled in their operation by the provisions of the last act; and if so, then they were not in operation when the contract was made.

I do not concur in the opinion that the legislature could not limit the amount to be paid for volunteers. They had the power of prohibiting any but drafted men from being received in the army, and having that power, they might also say that a limit should be placed on the sums to be paid for substitutes.

For the reasons, however, first stated, I think, at the time of making this contract there was no limitation in force, and that judgment should be rendered in favor of the plaintiff upon the verdict.

Judgment ordered for defendant.

SUPREME COURT.

THADDEUS C. KINNIER agt. ABBY A. KINNIER.

An action for *divorce* by a husband against his wife, on the ground that the wife and her former husband obtained a decree of divorce by *collusion and fraud*, in another state from that of their domicil, and against the laws of the latter state, and that the plaintiff married the defendant on the faith of the representations that she had procured a valid divorce from her former husband, cannot be maintained.

If the parties to the divorce suit colluded together, and by such collusion fraudulently obtained the decree of divorce, neither of them could possibly avoid that decree; it is binding upon both.

Where both parties unite to practice a fraud, neither can be heard to seek relief against it; and as the plaintiff cannot be prejudiced if his marriage were lawful, he, a stranger, has no interest in the matter which would authorize him to impeach the judgment for fraud.

New York Special Term, February, 1868.

THIS action was brought to obtain a decree declaring void a marriage contract entered into between plaintiff and

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defendant on the 28th of June, 1861. The defendant was married to one Pomeroy, in the state of Massachusetts, in 1848. It is charged that in 1855 Pomeroy left Massachusetts, went to Chicago and commenced a suit against his wife Abby. That the latter, by collusion with her husband, aided him in fraudulently obtaining a divorce in Illinois, &c. The defendant in this suit put in a demurrer to the complaint.

C. A. SEWARD, for defendant.

The defendant was married in Massachusetts, in 1848, to one Pomeroy.

In 1855, Pomeroy, with intent to evade the laws of Massachusetts, went to Chicago to procure a divorce, for causes which were not recognized by the laws of Massachusetts, and commenced a suit for that purpose. The defendant went to Chicago, and appeared in said suit, and put in an answer. The plaintiff put in no replication, as he was bound to do by law, whereby the answer stood confessed.

The parties, by collusion, on the 19th of September, 1855, procured to be entered and docketed a formal decree of divorce, which directed that an absolute divorce from matrimony be decreed, as by reference to said decree will more fully appear.

Such decree was fraudulently procured by unlawful collusion, and was and is a nullity by the laws of Massachusetts and Illinois, and may be inquired into by the courts of this state, and be declared null and void.

On the 28th of June, 1861, the plaintiff and defendant did attempt to contract a marriage.

The prayer is, that the Illinois decree may be adjudged to be fraudulent and void, and the attempted contract of the 28th of June, 1861, to be a nullity, and never to have had any legal existence; and that the defendant may be barred from dower.

There are two grounds of demurrer:

1. The court has no jurisdiction of the alleged cause of action.
2. The complaint is insufficient.

I. This action can only proceed under title 1, article 2, part 2, chapter 8 of the Revised Statutes (2 R. S. 142), entitled, "Of divorces on the ground of the nullity of the marriage contract." Apart from the authority thus conferred, this court has no jurisdiction whatever to annul a marriage contract. No such power is contained within its inherent jurisdiction. (*Burtis agt. Burtis, Hopk. Ch. R. 559.*) In *Pugnet agt. Phelps* (48 Barb. S. C. R. 566), Judge CLERKE said: "This court has no inherent power to declare a marriage contract void. Whatever power this court possesses is given by statute." This was followed in *Ives agt. Ives* (MSS.), and to the same effect is *Jarvis agt. Jarvis* (3 Edw. Ch. R. 462).

II. The force of this cannot be evaded by the allegation that the marriage contract between the parties hereto was only an "attempt," as it is denominated in the complaint, and not an actual contract, for the reason that the plaintiff has sued the defendant by his name and as his wife, and thereby admitted the contract *in extenso*.

III. If, therefore, the cause of action, as stated in the complaint, is not embraced within the provisions of the statute, this court has no jurisdiction, and the complaint must be dismissed.

IV. The complaint seeks to present two grounds of jurisdiction:

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1st. Fraudulent representations by the defendant as to the validity of the Illinois divorce, and the grounds thereof.

2d. The absolute illegality of the Illinois divorce leaving in force the defendant's former marriage, and of course a former husband at the time of the second marriage.

1. The first ground is inconsequential and untenable,

(a.) No representations as to the divorce could have induced the second marriage. It would be insensible to say that the second marriage was contracted because of the divorce.

(b.) The defendant's allegation that the Illinois divorce was valid is as yet true.

(c.) The defendant's allegation that she procured the divorce from her former husband on the ground of his adultery, must, as it is not denied, be taken as the ground upon which she assented, as it appears from the complaint she did assent, to the judgment of divorce. By assenting to the judgment she did procure it, and the fact that her motive and ground for so doing was the adultery of the complainant is of no consequence, as his chastity is not averred.

(d.) The alleged representations are not of a kind which equity regards as constituting such fraud as requires the dissolution of the marriage contract. The frauds which equity relieves against are those which are perpetrated by force or duress, or those which concern property, or affect the rights of property (1 *Day's Cases in Error*, 111). If the defendant had said that her first husband was dead, she would have said no more than she did say, for he was dead to her by reason of his adultery and divorce; but even such a representation has been decided by this court not to be a ground for annulling a marriage contract, per SUTHERLAND, J., who said: "I find neither precedent nor principle for declaring a marriage void for fraud as to or in such a matter or thing." (*Clarke agt. Clarke*, 11 *Abb. Pr. R.* 230.)

(e.) The complaint is defective in not averring, as required by the statute (2 *R. S.* 143, § 31), that since the plaintiff acquired knowledge of what he denominates a "fraud, there has been no voluntary cohabitation between the parties."

(f.) It does not appear where the second marriage was contracted, nor that at the place of contract it was void, or that it could have been there avoided for the causes here alleged.

1. This court has no power to annul a marriage contracted out of this state.

2. If it has such power, then it can exercise it only in case of fraud, recognized as such at the place of contract.

Every presumption is against the pleader, and especially the presumption "*Omnia praesumuntur rite et solum niter esse acta donec probetur in contrarium contra spoliato-rem;*" and "*donec probetur; stabit praesumptio.*"

A marriage out of this state being assumed, its legality is presumed, and if legal at the place of contract, it is legal everywhere. (1 *Bishop on M. and D.* § 355.) No fraud at the place of contract being averred, this court has no jurisdiction to annul the marriage.

2d. The second alleged ground of jurisdiction also fails.

1. This court has no jurisdiction to set aside the judgment rendered by a court of record in a sister state.

(a.) Every judgment, however entered, is valid until vacated. This suit concedes that the judgment is as yet valid in Illinois.

(b.) It is therefore within the constitutional protection as to its force and validity here. (*Const U. S. Art. 4, § 1.*)

In *Bicknell agt. Field* (8 *Paige*, 445), the chancellor said, "It is at least doubtful whether any court in this state has any right or power to inquire into the regularity of a judgment recovered in one of the superior courts of a sister state, after personal service of the process upon the party against whom such judgment was obtained.

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It would not be giving full faith and credit to the record to permit it to be alleged, and shown that the judgment record was made up and filed fraudulently by the clerk of the court and without authority." What the party enjoined cannot do, *a fortiori* a stranger cannot do. (*Westervelt* agt. *Lewis*, 2 *McLean*, 511.)

"If the foreign court which rendered the judgment," said PARSONS, C. J., in *Bissell* agt. *Briggs* (2 *Mass.* 440) "had jurisdiction of the cause, the regularity of the proceedings is not to be drawn into question." "The courts of one state," said the court in *Rogers* agt. *Rogers* (15 *B. Mon.* 364), "cannot change or alter the decisions of another on the ground that they are erroneous."

2. The judgment remaining unreversed, even the parties could not, either in Illinois or in this state, maintain an independent suit to annul it. (*Hood* agt. *Hood*, 11 *Allen*, 200.) The validity of the judgment can be tested only by appeal in the suit in which it was rendered. (*Bicknell* agt. *Field*, *supra*; *Burles* agt. *Shannon*, 3 *Gray*, 388.)

3. The old maxim, "*Res judicata pro veritate accipitur*," applies here as forcibly upon every ground as it ever can apply, and defeats this action. The law proceeding upon the maxim, "*Interest reipublice ut sit finis litium*," regards such judgments as conclusive. (*Phillips on Ev.*, *Cowen and Hills' Notes*, Part 2, 824, 946.)

4. One reason only can be assigned for declaring a judgment void, and that is that the court by which it was rendered had no jurisdiction of the subject matter or of the parties. Such reason does not exist in the present case, and has not, of course, been here assigned.

5. The circuit court of Cook county, having had jurisdiction both of the subject matter and of the parties, its conduct of the cause prior to the judgment is a matter with which it is alone concerned; and whether it was erroneous or not, this court cannot inquire into it. Where the record shows jurisdiction of the subject matter and the person, the judgment of the court cannot be questioned for errors of substance or form intervening. (*Lane* agt. *Bommelmans*, 17 *Ill.* 95.)

If a court has jurisdiction of the subject matter and of the person, a judgment or decree rendered by it, however irregular or erroneous, will not be void, but merely voidable. (*Walker* agt. *Rogan*, 1 *Wis.* 597.) Such errors can be taken advantage of only on appeal (*Farrington* agt. *King*, 1 *Bradford*, 182), and the judgment is conclusive until reversed, (*De Laney* agt. *Reed*, 4 *Iowa*, 292; *Cole* agt. *Butler*, 43 *Maine*, 401; *Kelley* agt. *Mize*, 3 *Smeed*, 59; *Smith* agt. *Knowlton*, 11 *New Hamp.* 192,) though the error appear on the face of the record (*Farmers' L. & T. Co.* agt. *Kinney*, 6 *McLean*, 1) and though the judgment was obtained by fraud (*Simms* agt. *Slacum*, 3 *Cranch*, 300) and though it is apparent that the court erred as to the law (*Preston* agt. *Clark*, 9 *Geo.* 244.)

6. If the judgment was fraudulently procured, it cannot be impeached for that reason in this collateral action. In *Tilford* agt. *Barney* (1 *Iowa*, 575) the court said "a judgment cannot be impeached collaterally for fraud." In *The People* agt. *Downing* (4 *Sandf. S. C. R.* 193) OAKLER, Ch. J. said: "The decree was obtained in a competent court, and cannot be impeached in a collateral proceeding. There is a way in which a decree, if it has been obtained through fraud, may be vacated, but that must be by a direct application for the purpose. No judgment rendered in a court of competent jurisdiction can be impeached in a collateral matter for fraud." To the same effect is *Lamprey* agt. *Nudd*, 9 *Foster (N. H.)*, 229 and *Wesson* agt. *Chamberlain* (3 *Const.* 332) in which the court said that a "judgment is not open to attack upon the merits in a collateral action."

7. The most that can be said against the judgment in this case is, that the court irregularly disregarded the answer and rendered judgment *non obstante*. In *Diehl* agt. *Page* (2 *Green*, Ch 143) the court said. "a judgment in a case in which the court

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rendering it had jurisdiction cannot, though irregular and not according to the statute authorizing it, be impeached by a stranger, collaterally."

The same point has been as strongly enunciated and decided in the following cases: *Maxwell* agt. *Pittinger*, 2 *Green*, 156; *Anderson* agt. *Fry*, 6 *Indiana R.* 76; *State* agt. *Connolly*, 6 *Iredell*, 243; *Miller* agt. *Barkeloo*, 3 *Eng.* 318; *Brown* agt. *Byrd*, *Id.* 384; *Cropsey* agt. *McKinney*, 30 *Barb.* 48; *Bumsted* agt. *Reed*, 31 *Barb. S. C. R.* 669, and cases there cited; *Barron* agt. *Tait*, 18 *Ala.* 668; *Mobley* agt. *Mobley*, 9 *Geo.* 247; *Wright* agt. *Marsh*, 2 *Greene*, 94; *Ranoul* agt. *Griffie*, 3 *Md.* 54; *Mills* agt. *Dickson*, 6 *Rich.* 487; *Vanderpoel* agt. *Van Valkenburgh*, 2 *Selden*, 190, *Cyphert* agt. *McClure*, 22 *Penn.* 195. The plaintiff therefore cannot attack the judgment rendered in Illinois.

8. But there was no irregularity in the rendition of the judgment.

(1.) The question of the immobility of the answer was one of rule and practice, and if after the answer was filed the defendant was called and made no answer, then the court could permit the plaintiff to withdraw the answer, or could treat the defendant as in default and order, as it did, judgment *pro confesso*. The practice is as old as the court of chancery. (2 *Daniels*, *Ch. P.* 695.)

(2.) It is always competent to withdraw an answer, and if counsel state in open court that the answer is withdrawn, the court proceeds to render judgment as in case of default.

(3.) The judgment record is referred to in the complaint, and it is therefore before the court. It appears upon an inspection to have been rendered without dissent and by default after personal service.

This is a matter purely within the control of the Illinois court, and the decree is to be regarded as having been rendered by consent and after trial, and, as such, is not subject to review. (*Wells* agt. *Martin*, 1 *Ohio*, 386.) The defendant could waive the privileges springing from the filing of her answer, as she could have waived a jury trial here, and by her silence she is to be deemed to have waived them. (*Bastwick* agt. *Perkins*, 4 *Geo.* 47.) This is especially so in view of the allegation in the complaint that the decree was by collusion.

V. The complaint proceeds upon a mistaken view of the law. In order to annul a judgment, a direct action of nullity must be instituted in the same court in which the judgment was rendered. No other court is competent to vacate the judgment. Where, however, a party to a void judgment seeks to avail himself of it, and makes it the basis of an affirmative action, then, and not till then, can the defendant attack it. (*Clark* agt. *Herbert*, 15 *La. An.* 279.) The defendant in this suit is not using the Illinois judgment for any purpose, and until she does bring an action upon it, this court has no power to inquire into it.

VI. The cause of action, as set forth in the complaint, does not fall within any one of the four subdivisions contained in the statute.

(a.) It is not for alleged minority.

(b.) Nor that there is a former husband of the defendant now living, her marriage with whom is now in force.

(c.) Nor that the plaintiff was an idiot or a lunatic.

(d.) Nor that the consent of the plaintiff was procured by force or fraud.

The cause of action is disclosed by the relief now sought, which is

(1.) Declare the Illinois divorce, rendered in December, 1855, to be illegal.

(2.) Declare that in consequence of such declaration, the former marriage of the defendant with her former husband is reinstated in full force.

(3.) Declare retroactively that it was so reinstated and in force in June, 1861, when the plaintiff married the defendant, notwithstanding the Illinois divorce was then unreversed and not vacated.

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(4.) Declare that in June, 1861, when the parties to this suit were married, the defendant's former husband was living, and that her marriage with such former husband was then in force, and that she has been guilty of bigamy.

(5.) Declare that in consequence of the decision in this suit a marriage lawfully contracted out of this state is made illegal.

(6.) And finally declare such marriage null and the defendant barred from dower in real estate, which the plaintiff has not yet acquired.

This court has never claimed, or exercised, or possessed any jurisdiction to grant any such relief (*Pugnet agt. Phelps*, 48 Barb. S. C. R. 566). Even if it had, morality and decency alike require that it should refuse to exercise it in the present case (*Singer agt. Singer*, 41 Barb. S. C. R. 140).

VII. The complaint should be dismissed.

G. W. PARSONS, *for plaintiff*.

CARDOZO, J. The allegation in the complaint that the parties resorted to Illinois to obtain a decree of divorce in fraud or violation of the laws of the place of their domicil, I think unimportant here. I can very well see how the state of Massachusetts might complain that its citizens had violated their allegiance to it, and how the courts of that state might disregard the judgment of another jurisdiction which granted a divorce to persons domiciled in the former state, who could not have obtained such a decree in the tribunals of that state. But I do not know of any principle, and have not been referred to any decision which sustains the doctrine that the courts of this state should thus protect the sovereign rights of Massachusetts. The complaint does not question the jurisdiction of the Illinois court over the subject matter, and it shows that that tribunal acquired jurisdiction of the persons of the parties—of the plaintiff by his bringing the action, and of the defendant by her appearing and answering the bill. Whether the rest of the complaint be deemed to charge in effect only that certain irregularities were had in the progress of the suit, or whether it sufficiently alleges that the parties practiced a fraud on the court, and thus procured the decree, will not be material to determine. If the former be the true construction, then it is enough to say that mere irregularity could not affect the

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decree, and that the plaintiff here, a stranger to that litigation, cannot be heard to question the regularity of the proceedings of that suit. He may raise jurisdictional questions, but not mere points of regularity in practice. If, however, the right view of the pleading be the latter one, above mentioned, and if the courts of this state can entertain a suit to annul the decree of a court of another state on the ground of fraud, yet this plaintiff is not in a position to ask any such relief. No one can claim to have a judgment or a deed avoided for fraud, unless it injuriously affects him, and such is not the case with this plaintiff. Giving the complaint the most liberal construction for the plaintiff, it charges that the representations upon the faith of which the plaintiff married the defendant, was that she "had procured a valid divorce" from her former husband. In other words, that this plaintiff and she might lawfully be married. Now if this be true, the plaintiff has not been harmed by this deception, and even if the representations were inaccurate, he will not be entitled to annul the marriage. The complaint does not dispute but that if the decree of divorce stands the defendant would be at liberty to marry, and that, therefore, must be assumed, but it avers that the parties to the divorce suit colluded together, and by such collusion fraudulently obtained the judgment. If that be so, neither of those parties could possibly avoid that decree. (*Bishop on Marriage and Div.* 706.) It is binding upon both of them, and the marriage between this plaintiff and the defendant was valid. Where both parties unite to practice a fraud, neither can be heard to seek relief against it; and as the plaintiff cannot be prejudiced if his marriage were lawful, he, a stranger, has no interest in the matter which would authorize him to impeach the judgment for that fraud. That his feelings or prejudices might have revolted at marrying a woman under such circumstances, gives him no standing in court. (*Clarke agt. Clarke*, 11 *Abbott, P. R.* 230.) Without adverting to other views which lead me to think that this complaint can

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not be sustained, enough has been said to show that, in my opinion, the demurrer is well taken, and that there must be judgment thereon for the defendant, with costs.

SUPREME COURT.

THE ERIE RAILWAY COMPANY and JAMES FISK, JR., agt.
MARSHALL B. CHAMPLAIN and others.

On an application for an order appointing a referee to take an *affidavit* or *deposition* of a person who refuses to make the same, to be used on a motion (*Code*, § 401, *sub. 7*), no notice is required to be given to the adverse party to the action of such application; and such party has not the right to appear before the referee to cross-examine the person making the deposition.

Neither can the adverse party make a motion to set aside or vacate the order made on such application; the person whose deposition is desired is the only one who can make such a motion.

Otsego Special Term, April, 1868.

MOTION by defendants to set aside an order dated the 28th day of March, 1868, appointing Amasa A. Redfield, Esq., referee to take the depositions of Cornelius Vanderbilt and others, to be used upon a motion in this action to suspend Frank Work from his office as director of the Erie Railway Company. The order was granted pursuant to subdivision 7 of section 401 of the Code, upon affidavits that Vanderbilt and the others named in the order had refused to make affidavits.

LEWIS SEYMOUR, *for plaintiffs.*

SAMUEL EDICK, *for defendants.*

BALCOM, J. The plaintiffs' counsel raises the question that the defendants cannot make this motion, and he insists that such a motion can be made only by the persons whose depositions the referee is required to take. The provision of the Code under which the order was made is: "When any

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party intends to make or oppose a motion in any court of record, and it shall be necessary for him to have the affidavit of any person who shall have refused to make the same, such court may by order appoint a referee to take the affidavit or deposition of such person." (*Code*, § 401, *sub.* 7.) No notice is required to be given to the adverse party to an action of the application for such an order, and such party has not the right to appear before the referee to cross-examine the person making the deposition. The order is a matter exclusively between the party that obtains it and the person whose deposition is desired; and I am of the opinion such person only can move to have it vacated. The party obtaining it should not be embarrassed by any motion of the adverse party to set it aside.

For these reasons, the defendant's motion to set aside the order of the 28th of March last, appointing Redfield referee to take the depositions of Vanderbilt and others, is denied, with \$10 costs.

SUPREME COURT.

THE ERIE RAILWAY COMPANY and JAMES FISK, JR., agt.
MARSHALL B. CHAMPLAIN and others.

Where a person whose *affidavit* or *deposition* is required to be used on a motion (*Code*, § 401, *sub.* 7) appears before the referee appointed for the purpose of taking such deposition, and is partially examined without objection, it is then too late for him to move to vacate the order appointing the referee, on the ground that he had not refused to make his deposition.

Otsego Special Term, April, 1868.

MOTION by James H. Coleman to set aside an order made at a special term of this court, on the first day of April, 1868, appointing Amasa A. Redfield, Esq., referee to take his deposition, to be used upon a motion in this action to suspend Frank Work from his office as director of the Erie

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Railway Company. The order was procured by the plaintiffs, under subdivision 7 of section 401 of the Code. Coleman appeared and was sworn before the referee, in pursuance of the order, and answered some questions that were put to him by the plaintiffs' counsel. His examination was then stopped by an order staying proceedings, under the order appointing the referee, until he could make this motion to set aside the last mentioned order, on the ground that he never refused to make an affidavit for the plaintiff.

LEWIS SEYMOUR, *for plaintiffs.*

SAMUEL EDICK, *for Coleman.*

BALCOM, J. It is unnecessary to decide the question whether the conduct of Coleman was such as to entitle the plaintiffs to an order appointing a referee to take his deposition, pursuant to section 401, subdivision 7, of the Code, if the facts had been fully and particularly presented to the court when the order was granted. He appeared, was sworn and partially examined before the referee, without objection. After doing that, it was too late for him to raise the objection that the order was irregularly granted, or to move to have it set aside, on the ground that his conduct had not been tantamount to a refusal to make an affidavit for the plaintiffs, to be used upon a motion in the action to suspend Work from his office of director of the Erie Railway Company. The question is not presented whether any of the interrogatories put to Coleman were impertinent, and I shall not express an opinion respecting the same.

The motion is denied, with \$10 costs to be paid by Coleman to the plaintiffs, on the sole ground that it is made too late.

Caswell agt. Davis.

NEW YORK COMMON PLEAS.

PHILIP CASWELL and others agt. THOMAS DAVIS.

A person who forms a new composition, and invents a new word to characterize it, is entitled to be protected in the exclusive use of such word as his trade-mark, and an injunction will issue to restrain others from appropriating it to designate a similar article.

Plaintiff had invented a "new medicine," and formed the compound word "*Ferro-Phosphorated*" to designate it. Such combined word was new.

Held, that he was entitled to the exclusive use of such compound word, and that others could be restrained by injunction from using it.

Special Term, December, 1867.

MOTION to dissolve injunction.

J. D. BILLINGS, *for motion.*

PARIS G. CLARK, *opposed.*

VAN VORST, J. The claim of the plaintiffs in this action is, that the name affixed by them to the medicine which was first compounded by them in 1861, "*Ferro-Phosphorated Elixir of Calisaya Bark*," is the subject of a trade mark, and that it is their property by priority of adoption, and cannot be appropriated by any other persons, to any article similar to the one manufactured by them.

The plaintiffs do not seek to enjoin the defendant from manufacturing and selling his compound, or any other mixture composed of any elements, but they insist that he shall not sell it with a label bearing upon it the name "*Ferro-Phosphorated Elixir of Calisaya Bark*."

The medicine, which the plaintiffs claim to be so useful and healthful in its application* as a remedial agent, and to be a source of great profit to them, was first prepared in their establishment with their own materials, by themselves and their clerk Coffin, under their directions.

The name by which it is designated was composed and

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applied to it first by them. Whatever Coffin did in the matter, whatever inventive skill he exhibited or experiments he performed, in this preparation, was under their advisement, as a clerk in their employment, and for the benefit of his principals.

The recipe for the composition was the property of the plaintiffs, as was the name *invented and applied*, if the name adopted can be the subject of property.

There was some evidence tending to show that similar preparations, in some of their essential elements, had been made and were in use before the plaintiffs experimented on or produced their article; but it is not established that any mixture composed of all the ingredients used by plaintiffs, or having a name in all respects similar to that adopted and applied by plaintiffs, was in use or known to the public before the plaintiffs introduced their medicine.

The Elixir of Calisaya or Peruvian Bark was in use, and perhaps in solution with iron in some form.

But this case shows that this composition, with its particular and specific substances, was first introduced by the plaintiffs under its peculiar name, "Ferro-Phosphorated Elixir of Calisaya Bark," and that they first applied the specific words, "ferro-phosphorated," in composition, to any medicine.

The question presented is, is this name, as combined and arranged by plaintiffs, the subject of a trade mark, and can they be protected in its exclusive use.

The case of *Wolfe agt. Goulard* (18 How. R. p. 64), is a leading one on this particular branch of the law of trade marks.

Mr. Justice INGRAHAM, who delivered the opinion in that case, says "that when a person forms a new word to designate an article made by him, which has never been used before, he may obtain such a right to that name as to entitle him to the sole use of it as against others who attempt to use it for a similar article. But such an exclusive right can

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never be successfully claimed of words in common use previously, as applicable to similar articles."

In the case of *Burnett* agt. *Phalon* (9 Bosw. R. 192), Mr. Justice PIERREPONT says: "No one can appropriate a word in general use as his trade mark, and restrain others from using that word."

In considering the case before the court in the light of these authorities, two facts are to be regarded:

The article composed by plaintiffs as a whole was original with them. In the condition it was presented to the public; it was new. As it was a recent composition, it would of necessity require a characteristic name, if its elements were to be indicated in its appellation. Compounded of substances known principally to chemistry, which science has a nomenclature peculiar to itself, the words to distinguish it would be in a language familiar to chemists and that limited class of persons who deal in drugs and chemicals.

It is true that the meaning of the words singly, which mark the compound in question, is known to a large class of persons other than those designated; but as far as the word "*ferro-phosphorated*" is concerned, it cannot be said that it is in common or general use, or that it is even understood by the great number of persons who take the remedy on the advice of a physician, as indicating the true nature and character of the mixture, unless the general advice and direction of the physician may suggest it.

Such persons may, and doubtless do in most cases, understand that the medicine ordered contains Peruvian bark and iron; but as they read the label on the bottle, they do not learn from it what the article really is, although its elements are generally indicated by the words used.

They are not like words in general or common use, in any true sense, which carry to the mind of all classes, instantly the eye lights on them, the true character of the contents of the package upon which they are placed.

All understand what the words "tobacco," "gin," "brandy,"

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"cotton yarn," mean; but the words "Ferro-Phosphorated Elixir of Calisaya Bark" would in general be unintelligible to most persons.

I am not certain that the distinction I have taken in respect to the particular words in this case, provided the words be strictly and in chemical language correct, removes it from the principles so well considered and clearly established in the cases of *Wolfe* agt. *Goulard*, or *Burnett* agt. *Phalon*.

But the views above expressed, it appears to me, apply with great force to the words "ferro-phosphorated."

There is nothing to show that this *compound word* was ever used, before it was so applied by plaintiffs, to indicate any preparation, and I have been referred to no book in any language in which it can be found; I have resorted to several chemical works and medical dictionaries, and find no such compound word. "Ferrum," of which "ferro" is a form, is a common word in the Latin; and "phosphorated" is recognized by Webster as an English word.

But I am of the opinion that no such word as "ferro" and "phosphorated," in combination, is to be found in any language, except the forming of it by plaintiffs has had the effect to introduce it, and if so, plaintiffs are entitled to the credit and use of it. The combined word, I am satisfied, is philologically incorrect. I do not suggest that the word is meaningless, or that its elements do not indicate in a general way some of the ingredients of the preparation, but it does not do so chemically, or in an exact sense, and was doubtless arbitrarily invented and arranged by plaintiffs.

In the case of *Burnett* agt. *Phalon*, the plaintiff had adopted as a trade mark the word "*Cocaine*," to designate a compound prepared by him in part from *cocoa nut oil*. It was upheld on the ground that Burnett had contrived a name unknown to any language, and sold his mixture under that appropriate designation.

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The defendant in that case urged that the word used by plaintiffs was compounded from the French.

I think it fairly to be inferred from the facts of that case, as they are reported, that Burnett meant by the word "*Cocaine*" to indicate to the public the presence of *cocoa nut oil* in his mixture.

I think in this regard there is an analogy between the case of *Burnett agt. Phalon* and the one before the court; the latter case is scarcely more strongly characterized than the former. The word "*ferro-phosphorated*" was *invented and applied* by plaintiffs.

In disposing of this case, we should not lose sight of the fact that the affidavits of several physicians were read on the hearing, from which it appeared that they have used this remedy in their practice for several years, and that when they prescribe "*Ferro-Phosphorated Elixir of Calisaya Bark*," they intend the medicine manufactured and sold by plaintiffs of that name.

The defendant was in the employment of plaintiffs at the time the experiments were performed which resulted in the production of their article. He was a helper in plaintiff's manufactory, and learned from the clerk, Coffin, who had the charge of the department, the composition of the article, and the substances used in its preparation.

Defendant subsequently left the employment of plaintiff, and commenced the manufacture and sale of a medicine according to the recipe communicated to him by the clerk; while they were together with plaintiffs.

He puts up the same in bottles about the size used by plaintiffs, with a label thereon as follows: "*Davis & Son's original and genuine 'Ferro-Phosphorated Elixir of Calisaya Bark,'*" which acts plaintiffs claim are intended to induce the belief that the medicine offered by defendant is the same originated and prepared by plaintiffs, and that persons have been deceived and plaintiffs injured thereby.

I have come to the conclusion, upon the facts of this case,

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that the plaintiffs are entitled to the exclusive use of the word "*Ferro-Phosphorated*," alone or in combination with any other words, and that their label to that extent is a proper subject of a trade mark.

I do not think that as to the words "*Elixir of Calisaya Bark*," which are well known and in general use, they are so entitled.

The motion to dissolve this injunction is denied, with liberty to the defendant to apply for a modification of it, in pursuance of the principles announced herein.

SUPREME COURT.

JOHN H. BRADY agt. THE MAYOR OF THE CITY OF NEW YORK, JOHN L. BROWN, and others.

Where a *tax levy law* passed by the legislature, for the city of New York, directly appropriates a specified sum for a particular object—repaving and repairing streets, and in pursuance of such law, the common council of the city pass an ordinance formally appropriating the money to such object; a *contract* for the work and expenditure of the money made by the act under the directions of the street department, must be regarded as made directly by the authority of the legislature, not by the authority of the common council.

Therefore a city *tax payer* and *cestui que trust* of the city property under the 3d section of the act of 1864 cannot maintain an action, under that act, against the common council and the contractor, to restrain them by injunction from making payments under a contract to do the work and to declare the contract void, on the ground that it was not made as provided by law—made without public notice for sealed proposals or bids as required by law, even though the *attorney general* or the *city corporation* could maintain such action.

The fund appropriated by the legislature, and which was to be expended under the contract, is not at all, to any extent or in any respect committed to the management of the common council or supervisors of the county, as *trustees* within the meaning of the act of 1864.

MOTION by defendants to dissolve injunction prohibiting the making of payments on contract for repairing the streets of the city of New York for the year 1867.

The contract was made without advertising for proposals.

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The grounds upon which the preliminary injunction was asked for and sought to be continued, sufficiently appear from the statements in the opinion.

JAMES EMOTT, *for plaintiff.*

AARON J. VANDERPOEL, *for defendant.*

SUTHERLAND, J. The counsel for the plaintiff argues, and appears to think, if it should be conceded that the contract made with the defendant, Brown, for repairing and keeping in repair the streets, &c., of the city, could and ought to be declared void in an action by the *attorney general* or the *city corporation*, on the ground that it was not made as provided by law; that is, upon the ground that it was made without public notice for sealed proposals or bids as required by law, that it would follow that this action can be maintained by the plaintiff as a city tax payer and a *cestui que trust* of the city property, under and by virtue of the 3d section of the act of April, 25th, 1864 (*ch. 404, p. 945 Laws of 1864*) and that it would also follow that the motion to continue the injunction ought to be granted, irrespective of the questions whether the amount by the contract to be paid for the work was too much, and whether the work had been and was being faithfully and properly performed by Brown.

This, I think, is a mistake; and it is the great defect of the counsel's argument.

It is settled that the plaintiff, as a tax payer, cannot maintain this action without the aid or authority of the 3d section of the act of 1864. (*Doolittle agt. The Supervisors of Broome Co. 18 N. Y. R. 155; Roosevelt agt. Draper, 33 N. Y. R. 318.*)

Is the plaintiff's case within that section?

The question is important and I have given it a careful consideration, and I must say that, in my opinion, the plaintiff cannot maintain this action under that section, though it should be conceded that the contract with Brown might



be declared void at the instance of the attorney general or of the city corporation in a proper action, on the ground that it was made without the observance of the formalities required by law, before referred to.

What is the law? and what are the facts?

The 3d section of the act of 1864 declares the common council of the city of New York, and also the supervisors of the county of New York, trustees of the property, funds and effects of said city and county, "so far as such property or effects are or may be committed to their management or control, and every person residing in said city and assessed to pay taxes therein, who shall pay taxes therein, is thereby declared to be a *cestui que trust* in respect to the said property, funds and effects; and the section further declares that "any co-trustee or any such *cestui qui trust* shall be entitled, as against such trustees and in regard to such property, funds and effects, to all the rights and remedies provided by law of any co-trustee or *cestui que trust* to prosecute and maintain any action to prevent *waste* and *injury* to any property, funds and estate held in trust," and the section further declares that "such trustees are hereby made subject to all the duties and responsibilities imposed by law on trustees," and that "such duties and responsibilities may be enforced by any co-trustee or *cestui que trust* aforesaid."

By the first section of the act of April 23d, 1867, commonly called the city "tax levy" for that year, the board of supervisors of the county of New York, among other sums of money, were authorized and *directed* to levy and raise by tax \$130,000 for repaving and repairing streets for the current year, the act expressly providing that the work was "to be done by contract or agreement, *as provided by law*, under the direction of the street department, and no contract to be made in excess of the sum authorized. (*Laws of 1867, p. 1602.*)

The 3d section of the act declares that, "should the common council neglect or refuse to make the appropriation for

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the several amounts herein authorized by law, &c., then and in that case, the mayor and comptroller are hereby authorized and *directed* to make said appropriations; and the appropriations thus made by the mayor and comptroller *shall be in effect the same as if made by the common council.*"

The 2d and 4th sections of the act declare, that the said several sums hereby appropriated shall be applied *only* to the objects and purposes for which the same are *hereby appropriated, &c.*

By the 5th section, it is declared that "the mayor, aldermen and commonalty of the city of New York shall not be liable upon any contract made, or expenditure authorized, or liability incurred, by any board, department, or officer of said corporation, for any object or purpose which is not expressly authorized by this act, nor for any contract made, or expenditure authorized, or liability incurred by any board, department, or officer of said corporation, for any object or purpose named in the act, beyond the amount appropriated to such specific object or purpose," &c.

Now, in view of these directions and provisions of the act of 1867, how can it be said that the \$130,000 raised and in the hands of the chamberlain or comptroller, and \$125,000 of which was, by the contract made with the defendant Brown, to be paid to him for the work to be done under the contract, and the remaining \$5,000 of which was to be expended in the discretion of the street commissioner, for the expense of the inspection and superintendence of the work to be done under the contract, were at all, or to any extent, or in any respect *committed to the management or control of the common council of the city of New York*, or to the *supervisors of the county of New York*, within the meaning or purpose of the 3d section of the act of 1864?

In view of the directions and provisions in the act of 1867 referred to, how can it be said that the \$130,000 were intrusted to the common council or the supervisors, or that the common council or supervisors had any management or

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control thereof after the money was raised and in the hands of the comptroller or chamberlain? or even that the contract made by the street commissioner with Brown was made by the authority of the common council or supervisors?

True, the 3d section of the act of 1867 probably shows that the legislature contemplated that the common council would *formally* pass an ordinance appropriating the \$130,000 to the purpose for which it was *directed* to be raised by the act; and true the common council did, on the 17th of May, 1867, pass an ordinance so formally appropriating the money, but the same section shows that this proceeding of the common council was a mere formal proceeding, as to which or the subject or object of which the common council had no discretion or control; in fact, that though in theory and form it was a city corporation legislative proceeding, yet in fact and substance that it was a mere ministerial proceeding; for by the same section, if the common council neglected to make the appropriation for thirty days after the passage of the act, the mayor and comptroller were not only authorized, but *directed* to make it with the *same effect as if made by the common council*.

A careful consideration of the directions and provisions of the act of 1867, which have been referred to, forces the conclusion that the \$130,000 should be regarded as in substance and effect directly appropriated by the legislature to the purpose for which it was raised, without, or free from any intervening discretionary power or control, either of the common council, supervisors, mayor or comptroller, and that the contract for the work and expenditure of the money to be made by the act, under the direction of the street department, should be regarded as to be made directly by the authority of the legislature, not by the authority of the common council.

If, then, we give to these directions and provisions of the act of 1867 the force and effect they were intended to have (and the constitutionality of them has not been questioned by

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the counsel), how can the plaintiff maintain this action as a city tax payer and *cestui que trust* of the city property, under the 3d section of the act of 1864; that section expressly declaring the common council and supervisors to be trustees of the city property, funds and effects, "so far as such property, funds and effects are or may be committed to *their management or control*. And if what has been said as to the act of 1867 is correct, the \$130,000 was not at all, to any extent, or in any respect, committed to *their management or control*.

Again, the 3d section of the act of 1864 gives the *cestui que trust* the right to prosecute and maintain an action "to prevent *waste and injury*" to the trust property.

Now, after a careful reading and consideration of all the affidavits submitted in this case, giving to the affidavit of chief engineer Craven the weight which it probably ought to have from his profession, official position, general knowledge of the subject matter and apparent disinterestedness, I am inclined to think that the weight of the evidence is that the sum of \$125,000 was a fair and reasonable sum for what was to be done and furnished by Brown under the contract, and that he had faithfully and properly performed, up to the time of the granting the injunction, his part of the contract; and if so, how could the payment to Brown of the contract price be a *waste* of the money, even if it should be deemed trust fund or trust property, within said 3d section.

Moreover, even assuming that the plaintiff can maintain this action as a tax payer and *cestui que trust*, under the act of 1867, for the purpose of having the contract declared illegal and void, for want of the observance of formalities required by law, yet, if in fact the sum to be paid under the contract was not too much, and Brown had properly done the work and furnished the materials to be done and furnished under the contract, up to the time of granting the injunction, it appears to me quite clear that the injunction restraining the further prosecution of the work and the pay-

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ment of the money, ought not to have been granted, especially considering the inconvenience to the public likely to arise from an interruption of the work.

The injunction must be vacated, and the motion to continue it denied with \$10 costs.

SUPREME COURT.

THE UNION BANK OF TROY agt. WILLIAM SARGEANT and
JACOB LOWN.

On appeal from an order appointing a receiver in supplementary proceedings, objections to the preliminary affidavit upon which the proceedings were originally founded cannot be entertained, where there is nothing in the papers to show that such objections were made before the county judge, or that he made any decision relating to them.

The proper remedy in such case would have been to have made a motion to vacate the original order.

The objection that the execution appears to have been issued after the expiration of five years from the entry of judgment, cannot be entertained on such appeal. If the execution was improperly issued, the defendant should have applied to the court to set it aside for irregularity.

Albany General Term, March, 1867.

PECKHAM, MILLER and HOGEBOM, Justices.

APPEAL from order of county judge of Rensselaer county, appointing a receiver in proceedings supplementary to execution, by defendant Lown.

The defendant interposes various objections to the preliminary affidavit upon which the proceedings were originally founded, which he alleges were made before the county judge, when the motion was made for the appointment of a receiver, upon the report of the referee to whom it was referred to examine the defendants, but which do not appear to have been urged by any of the motions upon which the appeal is heard.

C. H. DENIO, *for defendants and appellants.*

Union Bank of Troy agt. Sargeant.

C. F. TABER, *for respondent and plaintiff.*

By the court, MILLER, J. It may be questionable whether the defendant has not waived the right to object to the preliminary affidavit, by appearing before the referee and submitting to an examination. It has been held that such appearance is a waiver in several cases.

In *Vibert agt. Frost* (3 Abb. 120, 121), DUER, J., says: "If the original order for the debtor's appearance was a nullity, he was not bound to appear; nor was he bound, when he appeared, to submit to an examination. His appearance and submission to an examination must, therefore, be regarded, if the order for his appearance was null, as voluntary acts. And it cannot be reasonably doubted that a valid order for the appointment of a receiver may be founded upon a voluntary appearance and examination of a judgment debtor."

Bingham agt. Disbrow (37 Barb. 24) holds the same doctrine, and cites approvingly the case last above named. (See also 8 How. 315.)

Sackett agt. Newton (10 How. 560), where it was held that the officer did not acquire jurisdiction, because the affidavit was insufficient, arose on an appeal from the order appointing a receiver, as well as the several orders prior thereto. The point was taken that the defendant had waived his right to object to the regularity of the proceedings, by appearing and submitting to an examination; but the question is not discussed in the opinion.

Passing by the point discussed, I am at loss to see how the objections to the affidavit can be raised upon this appeal from the order appointing a receiver. There is nothing in the papers to show that the objections to the preliminary affidavit now urged were made before the county judge, or that he made any decision relating to them. I think the proper course would have been to have made a motion to vacate the original order. This was done in *Owen agt.*

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Dupignac (17 *How.* 512), and I do not see how this question could properly be presented in any other way. This would bring the question up directly, so that a decision could be had and an order made which could be properly reviewed on appeal. And such seems to be the practice. (*Lindsay* agt. *Sherman*, 5 *How.* 308; *Conway* agt. *Hitchins*, 9 *Barb.* 378, 387; *Bank of Genesee* agt. *Spencer*, 15 *How.* 14.)

If the objection made, that the execution appears to have been issued after the expiration of five years from the entry of the judgment, can be entertained here, I think it is not a valid one. If improperly issued, the defendant should have applied to the court to set it aside for irregularity. (*Sandford* agt. *Sinclair*, 8 *Paige*, 372.) It may have been issued by the order of the court, for anything which appears in the papers, or a prior one may have been issued within the five years, and returned unsatisfied; and I do not think that it was essential to show that either the one or the other of these contingencies had occurred on the application for the original order.

The second subdivision of section 292 of the Code provides that the same proceedings may be had as for the application of the property of the judgment debtor towards the satisfaction of the judgment as are provided upon the return of an execution. This would authorize the appointment of a receiver, if necessary; and I think sufficient appeared from the defendant's examination to warrant the order made.

The order of the county judge must be affirmed with \$10 costs of appeal, without prejudice to any application of the defendant to set aside the order first made, and subsequent proceedings.

I concur. I think the last clause, "without prejudice," &c., might just as well be omitted.

H. HOGEBOM.

I concur in the within, with the proviso retained.

R. W. PECKHAM.

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SUPERIOR COURT.

BURTON G. MORSS, appellant agt. JOSEPH H. JACOBS, respondent.

BURTON G. MORSS, appellant agt. PHILANDER K. SALISBURY, respondent.

In an action of trespass on land, commenced in the supreme court by reason of a plea of *title* interposed in the justice's court, and the supreme court found that the defendant had title to so much of the premises as he pleaded title to; and that the trespasses committed by defendant, for which the court gave plaintiff judgment for \$5, were committed on the piece of land to which the defendant *omitted to plead title*; and that as to such trespasses the title was not in issue; and that the defendant did not controvert the plaintiff's title to or possession thereof on the trial:

Held, that the plaintiff having failed to recover \$50 damages, the *defendant was entitled to costs*. To entitle the plaintiff to costs in such an action, under the Code, the judgment in the supreme court must be for the plaintiff *on the issue presented by the plea of title*.

It is only those issues which are covered by a plea of title, which are intended to go up to the supreme court at all; as to the other issues or causes of action, they should be continued before the justice, on the plaintiff's motion; otherwise, if proceeded with in the supreme court, they have no influence on the question of costs. (*It will be seen that this decision agrees with that in Heath agt. Barmour, ante p. 1, and the note made thereto. This case was received after the case of Heath agt. Barmour and note were put in print.*)

Albany General Term, March, 1867.

PECKHAM, MILLER and HOGEBOM, Justices.

The above cases are appeals from judgments rendered on decisions made therein, by Justice MILLER, one of the justices of this court, before whom the causes were tried, without a jury, at the Greene county circuit, held at Catskill, on the 5th day of June, 1865.

Two cases and exceptions are before the court on appeal; but the pleadings in each are identical, and the same principles of law controlled both actions, and the same evidence substantially was given upon the trial of each cause, and both cases were tried together, and the same decision was rendered in each.

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The suits were brought to recover damages for alleged injuries upon two different parcels of land—one known in the case as “the 100 acre lot,” secondly described in the complaint; and the other, first described in the complaint, being lands adjoining the tavern stand property of John Brandow, deceased.

The actions were originally commenced in justice’s court, in June, 1860. A plea of title was interposed by the defendant in each case, and these actions were at once brought in this court, as stated in the case. The actions were tried before Justice HOGEBOM, without a jury, at the February term of the Greene circuit, 1862. The two cases were tried together.

Judge HOGEBOM, in deciding the cases, is said to have found: 1st. That the plaintiff had title to the 100 acre lot, and that the defendant Jacobs committed trespasses thereon to the amount of \$80. 2d. That the defendant, and those under whom he claimed, had title to that part of the premises included in the complaint, which is first described in the answer, known as the “*tavern stand lot*,” and so far the defendant was justified in the acts done by him thereon. 3d. That the plaintiff had possession of the residue of the premises described in the complaint, to which the defendant did not plead title, and that the defendant committed trespasses thereon to the amount of \$5. Judgment was ordered for the plaintiff.

The judge also certified that title to lands came in question on said trial.

Judgment for the plaintiff was perfected on the decision of the justice in each case.

The judge, it is said, also made the same decision in the case against Salisbury, but found that the defendant Salisbury had not trespassed on the 100 acre lot, to the injury of the plaintiff. Also that the “*tavern stand lot*” did not belong to the plaintiff, and the defendant was justified in his acts thereon; but that the said defendant had committed

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trespasses on other parts of the plaintiff's premises, to which he had not plead a title, to the amount of six cents.

The defendants appealed from the judgments entered on the decision of each case to the general term.

The appeals were argued at the December term of this court, 1864, before judges PECKHAM, MILLER and INGALLS, and the judgments in the cases were reversed and a new trial granted, costs to abide the event.

No written opinion was delivered; but the court was unanimous in holding that the learned judge before whom the cases had been tried, erred in finding that the plaintiff had title, and the defendants did not have title, to the one hundred acre lot; and that upon this ground a new trial was ordered.

The cases were brought on again for re-trial at the Greene County June circuit, 1865, before Justice MILLER, supreme court justice, without a jury.

By stipulation, the parties read from the printed cases, the evidence given on the former trial, each to have the right to add to or take therefrom.

The judge, in deciding said actions, found in each case:

1st. That the defendant, and those from he claimed, had title to the one hundred acre lot, and that he had committed no trespasses thereon to the plaintiff's injury; and this plaintiff had not maintained his action thereto.

2d. That the defendant, and those from whom he claimed, had title to that portion of the tavern stand premises set forth in the answer, and that the defendant had maintained his plea of title thereto.

3d. That the plaintiff had possession of the residue of the premises set forth in the complaint, not embraced in defendant's plea of title, and that the defendant had trespassed thereon. That the plaintiff was entitled to recover therefor the sum of \$5 against Jacobs and six cents against Salisbury. That as to such lands the title was not put in issue by the defendant, and was not questioned at the trial, and

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4th. That the defendant was entitled to recover costs.

The plaintiff excepted to the finding and decision in each case.

Judgment was entered upon the finding and decision in each case, on the 31st day of July, 1865, against the plaintiff for \$477.06 costs.

And in favor of the plaintiff against Jacobs for \$5 damages.

And against defendant Salisbury for six cents damages.

The plaintiff has appealed from said judgments to this court.

The questions raised on this appeal are substantially the same in each case, and arise upon the same exceptions, rulings and evidence.

The controversy relates to two separate and distinct parcels of land :

1st. A lot of 100 acres, described in the complaint, and to which title was set up in the 3d defense of the answer.

2d. A lot known as the tavern stand, described in a deed from Jacob Haight, sheriff of Greene county, dated May 25th, 1816, and set forth at length, and containing about 60 acres.

As to the 100 acre lot, both parties claim title under John Brandow, who died in 1859.

As to the 60 acres, the defendants claim title under Brandow, and the plaintiff, in hostility to Brandow, under title from Nicholas Elmendorf.

For greater order and convenience, the evidence as to each parcel was given separately at the trial.

The sixty acres were claimed by defendant to have been occupied by John Brandow, from 1815 to the time of his death.

The land was divided into three pieces above the road, while occupied by him, and two south of the road, as shown on the map herewith presented, viz: The middle lot, on which the tavern stood; the westerly lot extending to the

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Pratt line; and the easterly lot, extending from the east parcel to the Batavia or Red Kill. The defendant's proof tended to show that the north line of the 60 acres was a straight line from the Pratt wall to the Red Kill, more or less, evidenced by fences, and monuments, and occupation, yet in pleading title thereto in the answer, the defendant did not embrace the whole land to the south of the north line, but started 6 chains and 86 links east from the big rock, thus leaving a small piece not covered by his plea of title.

On the trial the court was requested to confine the plaintiff's evidence of trespasses, within the boundaries of defendant's plea of title. The court refused so to do.

The court, finds that the defendant had title to all of the 60 acres, or to so much thereof as he plead title to. The trespasses committed by defendants, for which the court gave plaintiff judgment in the one case of \$5 and in the other of 6 cents, were committed on the piece to which defendant omitted to plead title. And the court finds that as to such trespasses, the title was not in issue; and that the defendant did not controvert the plaintiff's title to or possession thereof on the trial.

The plaintiff failing to recover \$50 damages in either case, the court held defendants entitled to costs.

As to the "100 acre lot," both parties claim under John Brandow, deceased. It is conceded that on the 22d day of April, 1839—the date of Morss' pretended title—John Brandow was the owner of the "100 acre lot" and in possession, claiming title. It is also conceded that if the title is not in the plaintiff, it is in the defendants, or those under whom they claimed and acted.

The only evidence of title, given by or relied upon by the plaintiff, is a duplicate agreement, entered into between B. G. Morss & Co. and Brandow, April 22, 1839, and set out in the printed case.

The duplicate first introduced is the one retained by Morss. Both are originals; both without seals.

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They differ in a single word only—the word “bark” in Brandow’s duplicate, reads “land” in the one retained by Morss. And upon this difference the plaintiff claimed to hold the hundred acre lot.

Such other facts as may be material are sufficiently stated in the opinion of the court.

A. J. PARKER, *for plaintiff, appellant.*

J. B. OLNEY, *for defendant, respondent.*

By the court, HOGEBOM, J. The argument of plaintiff’s counsel, so far as it aims to show that, under the agreement between the plaintiff and John Brandow, the plaintiff had title to the 100 acre lot, may be dismissed with the remark that this court on a former occasion decided the contrary way, and the question is *res adjudicata*. Though not present when the decision was made, I am informed by my brethren they were clear and unanimous on this point, and we must regard it as disposed of, so far as this court is concerned.

This conclusion was arrived at on the face of the instruments themselves, and without reference to extrinsic evidence. There was, therefore, no error in excluding evidence offered by the plaintiff to show that the price paid was the full value of the land, bark and timber together, except the hard wood. There was no request on either side to reform the instruments, and the evidence would seem to be admissible (if at all) only on such an issue.

An exception is also taken by the plaintiff to the admission of evidence offered by the defendant, that the latter claimed his north line to be a straight line, and claimed the east and west lots as his; that he had got sixty acres and the bluff thrown in, and these together run up to this straight line on the north side; that he claimed a certain corner, where he directed the fence to be fixed, as his corner, and spoke of a rock on or near the end of Pratt’s wall as on the line; and

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claimed a certain pile of stones and a big rock as his corner ; and claimed to own a certain lot, and to own up to the north fence.

I am inclined to think that, in connection with the facts and circumstances proved in the case, that all this evidence was admissible, either as showing a claim of title to land which the defendant or Brandow held adversely to the plaintiff, or as characterizing the nature, manner and extent of the defendant's possession.

The plaintiff supposes that much of this evidence relates to land of which there is no proof that the defendant or Brandow had actual or partial possession, and especially that there is no evidence that he was in possession of either the east or the west lot ; but I think he is mistaken in this particular as a question of fact upon the evidence. The authorities on this subject are familiar. (*Jackson agt. Vredenburg*, 1 *Johns.* 159; *Jackson agt. Van Deusen*, 5 *Id.* 144, 157; *Jackson agt. Shearman*, 6 *Id.* 21; *Jackson agt. McVey*, 15 *Id.* 234; *Burlingame agt. Robbins*, 21 *Barb.* 327; 1 *Cow. & Hill's Notes*, 217 to 221.)

The court is supposed to have erred in holding that plaintiff had no right to recover for the trespasses committed upon the 100 acre lot. I do not understand the court to have so held, in regard to any wood or timber which by the agreement belonged to the plaintiff. The bass wood trees, I presume, were held by the court (trying the case without a jury)—and there was evidence to justify such holding—to be *hard* wood. Even if the judge had erred in that particular to the slight extent of the value of a few soft wood trees, the value being ascertained, it would not be ground for a new trial, but for correcting the finding in that particular.

My examination of the case does not enable me to concur with plaintiff's counsel in saying that the judge *clearly* erred in his decision that the title to the triangle was in the defendant, and not in the plaintiff. There is doubtless a conflict of evidence on that point, but the minute and numerous

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references in the defendant's points bearing on that question, most of which I have examined in connection with those made on the part of the plaintiff, do not allow us, I think, to say that there was legal error in the conclusion to which the judge arrived on that subject, for which a new trial should be granted. It is not material to consider, in this aspect of the case, whether the defendant, in his plea of title, started his description six chains and eighty-six links further easterly than the true starting point near the Red Kill bridge. Notwithstanding this alleged error, the defendant presented proof tending to show that his title extended much further easterly than the most easterly point designated in the plea of title, and consequently embraced the whole of the triangle. The judge appears to have come to that conclusion, and we cannot say that it was not warranted by the evidence in any such sense as justifies our interference.

And without going at large into a detailed statement of the evidence, but which I have examined, as contained in the case and referred to in the points, I am not prepared to say that in reference to the tavern stand premises the judge erred, as it is claimed by the plaintiff that he did, in holding that the defendants had established title to any of the land except the twenty acres on which the tavern stood. There is much evidence tending to show an actual and an adverse possession by Brandow and those under him of the east and west lots, up to the north line, as claimed by the plaintiff. The south was the well defined line of the turnpike. I have consulted the various references to the testimony contained in the points of the respective counsel, and do not think a new trial ought to be granted on account of the conclusion to which the judge arrived on this point.

But a very serious question remains to be considered, and that is, whether the judge decided right in awarding costs to the defendants respectively in these actions. As this is a part of the judge's finding, and is incorporated as such in the

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judgment, the objection to it may be availed of, I think, by exception, and considered on this appeal.

I do not agree with plaintiff's counsel in the conclusion that, if section 304 of the Code covers this case, the plaintiff would nevertheless be entitled to costs, simply for the reason that, in causes of action to which no plea of title was interposed, the plaintiff obtained a verdict for trespasses committed by the defendant.

Subdivision 1 of that section, which provides that costs shall be allowed of course to the plaintiff, upon a recovery in an action, when a claim of title to real property arises on the pleadings, or is certified by the court to have come in question on the trial, does not, I think, apply to actions commenced in a justice's court, but to those originally commenced in this court.

Subdivision 3, I think, is the one which covers this case. It is as follows:

"3. In the actions of which, according to section 54, a court of justice of the peace has no jurisdiction."

Section 54 is as follows:

"But no justice of the peace shall have cognizance of a civil action: 1. In which the people of the state are a party, excepting for penalties not exceeding one hundred dollars; 2. Nor where the title to real property shall come in question, as provided by sections 55 to 62, both inclusive."

Section 61 regulates the recovery of costs. It is as follows:

"If the judgment in the supreme court be for the plaintiff, he shall recover costs; if it be for the defendant, he shall recover costs, except that upon a verdict he shall pay costs to the plaintiff, unless the judge certify that the title to real property came in question on the trial."

Now, although it is literally true, in this case, that the judgment in the supreme court is (*in part*) for the plaintiff, yet I think it is not so within the meaning of this section, which

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meaning is, I think, that the judgment must be for the plaintiff *on the issue presented by the plea of title.*

Indeed, it seems to me that it is only those issues which are covered by a plea of title which are intended to go up to the supreme court at all; for by section 62, "If, in an action before a justice, the plaintiff have several causes of action, to one of which the defense of title to real property shall be interposed, and as to *such* cause the defendant shall answer and deliver an undertaking as provided in sections 55 and 56, the justice shall discontinue the proceedings *as to that cause*, and the plaintiff may commence another action therefor in the supreme court. *As to the other causes of action, the justice may continue his proceedings.*" And if he does not continue his proceedings as to such causes of action on the motion of the plaintiff, I think the plaintiff loses them. At all events, if they are proceeded with in the supreme court, I think they have no influence on the question of costs.

If, therefore, the question of costs is to be determined by the rule of the Code, I think it was rightly decided in the court below. But both of these actions are palpably actions to recover damages for trespasses on lands, and in regard to that class of actions it is claimed that this court has decided, after an examination of the statutes, that the Code does not apply to them, but the provisions of the Revised Statutes are still in force, and that by them the plaintiff recovering any sum in the supreme court is entitled to costs. (*See Allen agt. Gifford*, 25 How. 289, 301.) This conclusion was reached, it is true, with some hesitation, but not without examination. It will not be profitable, I think, to re-open the question in regard to any matters coming directly within the principle of that decision, but it will be better to leave them to be disposed of by a higher tribunal. But passing by the intrinsic difficulties of that question, there seem to me two reasons why we should not apply the principle of that case to the present:

1. The trespasses for which damages are recovered in these

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actions do not come within the language or description of trespasses defined in the article of the Revised Statutes entitled "Of trespasses on lands." (2 R. S. 338.) That statute gives treble damages against any person who shall *cut down or carry off any wood or timber, or girdle or despoil trees on the land of another, without leave of the owner.* The trespasses referred to are *willful* trespasses, because in the next section the damages are reduced to *single* damages, if committed on land which the trespasser had probable cause to believe his own; and they are repeatedly spoken of in the cases as trespasses *under the statute.* Now, although the trespasses complained of in the cases at bar, in addition to injuries done by cattle, include also acts of cutting down, carrying away and destroying trees, wood and timber, and so might perhaps be plausibly claimed to come under the statute, yet the trespasses for which damages are actually awarded by the court are only in the Jacob's case, as follows: "And that the defendant's cattle have committed trespasses thereon to the amount of five dollars;" and in the Salisbury case, "and that the defendant's cattle have committed trespasses thereon to the amount of six cents." They do not, therefore, seem to be embraced in that description of trespasses referred to in the statute.

2. Inasmuch as section 61 of the Code has defined the cases in which, upon the interposition of a plea of title, the parties shall respectively be entitled to costs, I think the special provision thus made for that class of cases (in which the present are included) must be deemed to override any general conclusions derived from any consideration of the statute concerning "trespasses on lands." This seems also to accord with the course of decision. Section 61 gives costs to the plaintiff, if he shall recover *judgment* in the supreme court; that is, as I understand it, judgment in that branch of the action elevated to the supreme court by the plea of title; and gives costs to the defendant, in the event of his success, when the judge shall certify that the title to

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real property came in question on the trial.

This certificate having been given, and the defendant having succeeded upon that issue, I think that the judge at the circuit rightfully decided that the defendants were entitled to costs.

The result is that the judgments in these cases must be *affirmed*.

COURT OF APPEALS.

THE COLUMBIAN INSURANCE COMPANY, respondent agt.
SAMUEL STEVENS and HENRY W. PEABODY, appellants.

In an action prosecuted by a *receiver* for the collection of an alleged money demand, instituted or carried on for the enhancement of the fund, for the benefit of those to whom it is ultimately to be paid, the defendant, on obtaining judgment in his favor, is entitled to *costs to be paid to him immediately out of the funds in the receiver's hands*.

The defendant in such case is not obliged to stand as a *general creditor* to await the final administration, and receive only (as the case may be) his distributive share of the fund *pro rata* with those for whose benefit he has been subjected to a groundless litigation.

The scheme and principle proposed by the chapter of the Code in relation to *costs*, is, that where costs are allowed, they shall be paid by the fund or party who would be benefited by a *counter judgment*.

Such a question is not one addressed to the discretion of the court in such a sense that no appeal lies to this court from the decision made in the court below.

January Term, 1868.

APPEAL from an order of the supreme court, duly affirmed by the general term in the first district.

This action was commenced by the plaintiffs on the 9th of January, 1866; but on the 23d of the same month, and before the defendants' appeared, receivers of the plaintiffs' property were appointed by the supreme court, and the action was prosecuted by the receivers and their successor to trial. The action was an ordinary suit at law for the recovery of money only. On a trial before a referee, the defendants ob-

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tained a report upon which judgment was entered for their costs of suit.

The defendants thereupon applied by motion for an order that the receiver pay such costs out of funds in his hands, showing by affidavit that he had funds in his possession as such receiver to a much larger amount.

The nature of the receivership was not shown by the papers, nor does it appear to what extent there are claims of creditors or others to the funds in the hands of the receivers.

The motion was denied at special term and the order was affirmed in general term.

The defendants appealed to this court.

IRA D. WARREN *for appellants.*

I. § 317 of the Code provides "In an action prosecuted or defended by an executor, administrator, trustee of an express trust, or a person expressly authorized by statute, costs shall be recovered as in an action by and against a person prosecuting or defending in his ownright; but such costs shall be chargeable only upon or collected of the estate, fund, or party represented, unless the court shall direct the same to be paid by the plaintiffs personally," &c.

It then excepts executors and administrators from its provisions where they are exempted by the Revised Statutes.

Under this provision of the Code we claim that the receiver, had he brought this suit, would have been bound to pay the defendants' costs. (*Conger* agt. *Hudson River Railroad Co.* 7 *Abbott*, 255.) § 321 of the Code, "In actions in which the cause of action shall by assignment after the commencement of the action, or in any other manner, become the property of a person not a party to the action, such person shall be liable for the costs, in the same manner as if he were a party, and payment thereof may be enforced by attachment."

Under these provisions of the Code, we asked the court below for an order directing the receiver to pay the defendants' costs, which the court denied.

The court erred in denying our motion for the reasons:

The defendant was entitled to the order directing the receiver who became the owner of the cause of action after suit brought to pay his costs. If, after the order had been made, the receiver refused, the defendant could have enforced his claim by attachment.

We have taken the only remedy under these provisions of the Code to enforce the payment of the defendants' costs. (*Colvard* agt. *Oliver*, 7 *Wend.*, 497; *Carnahan* agt. *Pond*, 15 *Abbott*, 194; 2 *Paige*.)

It seems perfectly clear that the receiver, being a trustee of an express trust, expressly authorized by statute to sue, he is bound to pay the defendants' costs out of the fund, unless the court direct him to pay it personally, and that the court were bound to order it paid out of the fund, as no misconduct is shown on the part of the receiver.

Under these sections of the Code we claim that we are entitled to this order as a

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matter of absolute right. (*Jordan* agt. *Sherwood*, 10 *Wend.* 122; *Giles* agt. *Halbit*, 2 *Kernan*, 32; *Colvard* agt. *Oliver*, 7 *Wend.*, 497; *Schoolcraft* agt. *Lathrop* 5 *Cowden*, 17.)

II. The receiver became the owner of this cause of action three weeks after it was commenced, and continued to prosecute it until a final determination of the action in favor of the defendant.

Can a receiver, with plenty of funds in his hands, incur an obligation in his capacity as receiver, and then refuse to pay it out of the funds in his hands?

Will the court permit a suit to be prosecuted against a party for the benefit of the fund in the receiver's hands, and, when it results in a failure, refuse to charge that fund with costs?

We submit, on a proper case being presented, as there was here, that the defendants are entitled to the order of the court directing its officer having custody of the funds to pay this money as a strict legal right, as the receiver cannot do it without the order of the court. (*Story's Equity Jurisprudence*, § 833.)

We submit that, where the receiver seeks by a suit to increase the funds in his hands and fails, that fund should be charged with the costs, and that the § 317 of the Code makes it chargeable on the fund expressly, unless the court order the receiver to pay it personally.

III. The receiver is an officer of the court; the funds of the plaintiff is, therefore, in the hands of the court.

Can the court incur an obligation in the prosecution of a suit to increase the funds in its hands, and then, if it fails, say to its unfortunate victim, "It is discretionary with me whether I pay you or not, and I am discreet enough not to do it?"

We submit this would be monstrous injustice and inequity, and that the supreme court has no such discretion; and that this court is the only court having power to correct it.

This order is reviewable by this court under § 11 of the Code, Sub. 3. It is a "summary application in an action after judgment," and it "affects a substantial right." (*Bank of Geneva* agt. *Reynolds*, 33 *N. Y. R.* 160; *The People* agt. *N. Y. Central Railroad Co.* 29 *N. Y. R.* 423.)

IV. We ask that the order of the general and special terms be reversed, and an order made directing the receiver to pay the costs.

T. G. SHEARMAN *for respondents.*

I. The appeal should be dismissed. The order of the general term is not reviewable in this court.

1. Assuming that the court below had power to make the order for which the defendants applied, it was certainly a matter within its discretion. The defendants had recovered judgment, and could have issued execution in the ordinary way. This was all to which they were entitled as a matter of right. It is not in the regular course of judicial business to grant an order directing the payment of a judgment. It may be that leave might have been required to issue an execution, the assets being in the hands of receivers; but this was not the relief for which the defendants applied. They asked for an order of a peculiar character, not to remove obstacles to the exercise of their absolute rights under the judgment, but to obtain a species of relief which was never obtainable under an ordinary money judgment, as a matter of course. Such a relief can only be asked as a *favor*, not as a *right*.

2. The decision of the court below against an application for a favor is not appealable. (*Spaulding* agt. *Kingsland*, 1 *N. Y. R.* 426; *King* agt. *Merchant's Exchange Co.* 5 *N. Y. R.* 547; *Candee* agt. *Lord*, 2 *N. Y. R.* 269; *Lansing* agt. *Russell*, 2 *N. Y. R.* 563; *Briggs* agt. *Vandensburgh*, 22 *N. Y. R.* 467.)

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3. The order applied for by the defendants was of much the same nature as an order requiring a receiver to file security for costs. It was designed to effect the same purpose *after* judgment, as an order of that kind would effect *before* judgment. Such an order, it is now settled, is not appealable. (*Briggs* agt. *Vandenburg*, 22 N. Y. R. 467.)

II. The court below had no power to make the order sought by the defendants' attorneys.

1. The statute under which the receivers were appointed, and which governs them, and the court in directing them, expressly prohibits any preference being given to judgments, except so far as they are liens upon real estate (2 R. S. 470, § 79). And it is only by virtue of a *judgment* for these costs that they can be recovered at all.

2. The statute provides for *pro rata* payments in all cases, except those particularly mentioned therein. A judgment for costs is not one of the excepted and preferred claims. (2 R. S. 470, § 79.)

III. There is no difference in this respect between the costs of an unsuccessful *defense* and of an unsuccessful *prosecution*. In the former case, no one pretends, or has ever claimed, that the costs are to be paid in full out of the assets of an insolvent corporation. But if the costs in either case are to be paid, the costs in both must be.

1. There is no difference made by the language of the statutes.

2. There is no difference in principle or upon grounds of expediency or public policy. The evil of an unjust defense is greater than that of an unjust claim, and it is of far more frequent occurrence.

IV. The rights of a defendant in this respect are abundantly protected by statutory provisions.

1. The defendants might have obtained security for costs. (*Code*, § 317.)

2. If the action had been carried on in bad faith, the receivers may be made personally liable. (*Id.*)

V. If the defendants could not avail themselves of these provisions, it must be for reasons which would make it no more than just that they should stand on the same footing as other creditors. They are not the only persons who suffer by the insolvency of the company. And there is no peculiar equity in their case which should give them a preference. Like many other defendants, they have defended a claim at some expense, and at the end find that the plaintiff is insolvent. It is hard, no doubt, but it is a hardship of every day occurrence; and often occurs where a claim is unreasonably pressed, which is not the case here. This suit has been maintained in good faith and on reasonable grounds. Part of the claim (the notes) has been settled.

VI. It has been attempted by the defendants' counsel to compare this claim to one founded upon an express contract with the receivers; and it was asked whether they could drive their clerks to accept a *pro rata* allowance with creditors of the company. The answer to this is easy.

1. A claim for costs acquired in hostility to the receivers is not founded upon any contract with them, express or implied.

2. If there was any contract in the case, it was with the *company*, not with the receivers. The action went on in the name of the company. If the defendants desired to establish any claim against the receivers, as distinguished from the company, they should have compelled the substitution of the receivers as parties plaintiff.

3. A clerk who continued to serve the *company* after the appointment of the receivers, and should make out his bills to the company only, would have to take his

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pay in the same manner as any other creditor. The reason why one who serves the receivers may receive his compensation in full is that he serves the court, of which the receivers are agents, and acts for the benefit of the creditors, whereas one who serves the *company* acts for the benefit of stockholders.

VII. It would be peculiarly unjust to the other creditors of the company to allow a preference in this case for the allowance of \$800, that being not so much a matter of strict debt and absolute right, as a favor granted to the defendants by the court, with a view to increase their *pro rata* allowance, as has been done in other cases.

VIII. The appeal should be dismissed, or the order of the court below should be affirmed.

WOODRUFF, J. The right of the defendants to have judgment for their costs in such an action as the present, brought against them for the recovery of money only, is absolute as well by the law before as since the Code of Procedure. There is no claim nor ground of claim that the allowance of costs in the action was discretionary.

The liability of the receiver, in whom the alleged cause of action became vested after the summons herein was served and by whom the action was prosecuted, is made by section 321 of the Code the same as if he had caused himself to be made a party.

The questions here are, therefore :

First. In actions prosecuted by receivers for the collection of alleged money demands, instituted or carried on for the enhancement of the fund, for the benefit of those to whom it is ultimately to be paid, is the defendant entitled to costs to be paid to him immediately, or must he stand as a general creditor, to await the final administration and receive only (as the case may be) his distributive share of the fund *pro rata* with those for whose benefit he has been subjected to a groundless litigation?

Second. Is the question stated addressed to the discretion of the court in such sense that no appeal lies to this tribunal from the decision made below?

It was conceded on the argument that the costs in question are chargeable upon and are to be collected out of the fund. This could not well be denied; and yet, in a case in which it does not appear by anything stated in the papers

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that there are other claims on the fund of any sort except the interests of the stockholders of the company, it would seem to follow as of course that the receiver should have been directed to pay those costs. Such an order is the appropriate mode of reaching funds in the receiver's hands. Not being in form a party to the action, no execution could reach the property he holds; and being the custodian of the fund, as an officer of the court, he is subject to immediate direction to pay it to a party entitled.

If it be assumed that the company was insolvent, and that the funds which the receiver holds or may collect, may not prove sufficient to satisfy all the creditors of the company, this does not, in my opinion upon clear and just rules governing the subject, impair the defendants' right to be paid in full, the fund being confessedly sufficient.

The receiver is *pro hac vice* the representative of the company, its creditors and stockholders. The action is prosecuted for the increase of a fund which is to be paid to them. It is not according to any rule of justice or equity towards third parties, that actions like the present should be prosecuted by the company or such representative, otherwise than at the expense and risk of the fund which it is sought thereby to increase.

In my opinion, the right of the defendants to this protection and indemnity against groundless prosecution is clear, and it is not necessary to invoke the 317th section of the Code for its maintenance, further than to say that its provisions warrant the charge of the costs upon the fund.

And such charge should be absolute and prior to the claims of those for whose benefit the action is prosecuted, if the rules of equity require it, whether that section imperatively entitles the prevailing party to such priority of payment in all cases mentioned in that section, it is unnecessary in this case to decide.

If the views thus expressed are in conformity with established rules relating to the subject, as they are, in my judg

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ment, conformable to what is obviously just, then it was not a matter of discretion to refuse the order sought.

The rule was applied by Chancellor WALWORTH to a case like the present, in which it *did* appear that the corporation was insolvent (*Camp* agt. *The Receivers of the Niagara Bank* (2 *Paige*, 283) where the receivers continued the prosecution of a suit at law, which was at issue before their appointment. In giving his opinion, he says: "If the receivers did not think it for the interest of the creditors to run the risk of having the costs charged upon the fund, they should have abandoned the suit, and then the petitioner would only have been entitled to share ratably with the other creditors.

"The petitioner is *entitled* to his costs down to the time of the nonsuit, to be paid out of the fund in the hands of the receivers," * * * and he made an order to that effect.

In my opinion, the scheme and principle proposed by the chapter of the Code in relation to costs, is that where costs are allowed, they shall be paid by the fund or party who would be benefited by a counter judgment, and that this case is not within any exception to the rule.

To the suggestion that the statute (2 *Rev. Stat.* 470, § 79) will not permit the preference sought, it must suffice to say that it is not sought to give a preference to the defendants in the payment of a debt of the company *as such*; it is to require the fund to bear and pay an expense incurred for its own benefit or increase.

Nor is it any answer to say that defendants often fail to collect their costs of a successful defense when the plaintiff is insolvent, and therefore the order made below works no unusual hardship.

Where the plaintiff has funds, the defendant is always entitled to collect, and does collect his costs. Now the beneficial party plaintiff has funds.

It may be said that this rule places it in the power of receivers to waste the whole of the assets in 'their hands in

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groundless litigation, and successful defendants are paid their costs, while creditors may get nothing. On that subject I answer, when the receivers accounts are passed, there will be abundant opportunity for creditors and others to inquire whether he has acted with due regard to their interests, and the right to require that he personally pay costs which he ought not to have incurred, is not confined to the parties to the actions. (*Colvard agt. Oliver et al.* 7 Wend. 497.)

The question whether an unreasonable allowance was or was not made to the defendants, is not before us. We must assume that the case called for it.

The order appealed from should be reversed.

All the judges reverse.

SUPREME COURT.

EDWARD J. NEWMAN and others agt. EARLE B. ALVORD and others.

The plaintiffs had, prior to January, 1866, for many years, at or near the village of Akron, in Erie county, N. Y., manufactured largely from the quarries there, *water lime or cement*, which was usually sold in barrels, with a printed bill pasted upon the barrels thus: "Newman's Akron Cement Company, manufacture, at Akron, N. Y.; the Hydraulic Cement, known as the Akron Water Lime." Part of this bill was printed in capitals, "Newman's Akron Cement Co.," and "Akron Water Lime" in large capitals."

The defendants were a firm manufacturing and selling water lime or cement from a quarry or bed in Syracuse, Onondaga county, N. Y., which they in January, 1866, re-named, and called it "Onondaga Akron Cement or Water Lime." The word "Akron" was not used in connection with their quarry until January, 1866. The defendants, in selling their cement, used the brand "Alvord's Onondaga Akron Cement or Water Lime, manufactured in Syracuse, in New York;" and they knew of the plaintiffs' quarries, and the name given to their water lime or cement.

Held, that the defendants, by the use of the name or word "Akron," in selling their cement, infringed upon the plaintiffs' *trade mark*; and the plaintiffs were entitled to a perpetual injunction, restraining the defendants from the use of that word.

It seems, that if the defendant's quarry and manufacture had been located at Akron also, they would have had an equal right with the plaintiffs to have used the name of Akron in their trade mark, within the principle of the case of *Brooklyn White Lead Co. agt. Masury* (25 Barb. 416); and that if both parties had had their

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quarries and manufactories at another place than Akron, both would have had an equal right to use the name Akron in their trade marks, within the principle of the case of *Wolf agt. Goulard* (18 How. 64).

Erie Special Term, November, 1866.

ACTION to restrain defendants from using a trade mark claimed by the plaintiffs.

It is alleged in the complaint that the plaintiffs are partners, and that they manufacture and sell a water lime or cement, known in the market as "Akron Cement" and "Akron Water Lime," from stone quarried by them in the town of Newstead, near the village of Akron, in the county of Erie, New York, and sold by the plaintiffs at Buffalo, and shipped by them to various places in the western states for sale. That plaintiffs, including their predecessors, have carried on such business for some thirteen years, using the term "Akron Cement" as their trade mark, to designate the origin and quality of their lime and cement; and that they put the trade mark on the barrels in which the lime and cement is packed and sold, &c.

That the defendants are engaged at Syracuse, in the state of New York, in manufacturing and selling water lime and cement, and in shipping the same packed in barrels to their agents in Cleveland, Ohio, and elsewhere, for sale. That the defendants' lime and cement are inferior to that manufactured by the plaintiffs, and do not command in market so high a price, unless it is sold under the trade mark of the plaintiffs. That the defendants have printed, or procured to be printed, a bill, containing, in large letters, among other things, the words "Akron Water Lime;" and that they are pasted upon the barrels of cement or water lime of the defendants, who are selling or causing to be sold such barrels, with the bills pasted thereon. That such cement or water lime was not manufactured at or near Akron. That "cement" or "water lime" means the same thing.

Averments of intention of defendants to mislead, and of their refusal to desist from the use of such trade mark.

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Demand of judgment that defendants be perpetually restrained from using the word "Akron" on their bills and in their business, &c., &c.

The defendants, in their answer, admit certain portions of the complaint, and deny other portions.

They allege that they had been for twelve months partners in manufacturing and selling water lime at Syracuse, and that they shipped lime to Cleveland, Ohio, and other places in Ohio, for sale. That the barrels so shipped were not marked with any brand, but that they procured hand bills or circulars for distribution in Ohio, and in no other place, for the purpose of aiding sales, which were thus: "Alvord's Onondaga Akron Cement or Water Lime, manufactured in Syracuse, in New York." Then follows the directions for use.

They deny any intention to injure or mislead the plaintiffs or the public, &c. &c. They aver that the article manufactured by them is a different and superior article, &c.

On the trial, the plaintiffs proved the material facts alleged in the complaint, touching their manufacturing and sale of lime, and their use of the word "Akron." That Akron was the name of the village in or near which the plaintiffs made their lime from the quarry there.

It appears that a person or firm other than the plaintiffs also made lime from the Akron quarries, commencing after the plaintiffs, as the successors of the plaintiffs, and that they used "Akron" on their brands and bills, similar to those used by the plaintiffs. The lime was the same kind as that made by the plaintiffs. The evidence showed that the consent of the plaintiffs was obtained by the other persons or firm to use such word and bills. The evidence showed that the brand used by the plaintiffs was an old and established brand in the market, by which the lime was sold, and that this lime was generally preferred. The sales were large. It was shown that the agents of the defendants for the sale of their lime in Cleveland, Ohio, used a bill, pasted

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upon the barrels. It was produced to the court, and is sufficiently described in the opinion. This was in September, 1866. In October the agents were using another bill, which is described in the opinion; also the bills used by the plaintiffs.

The defendants became a firm in January, 1866. Prior to that the firm was Alvord & Brady, for two years, and before that, E. B. Alvord. The defendants called their bed or quarry in Syracuse "Onondaga Akron Cement or Water Lime." The word "Akron" was not used in connection with their quarry until January, 1866. They knew of the plaintiffs' quarries and the lime made by them, and of its reputation, and the name given to it.

Some other facts are stated in the opinion.

JOHN GANSON, *for plaintiffs.*

GEO. N. KENEDY, *for defendants.*

MARVIN, J. The case may be stated briefly thus:

The plaintiffs had, prior to January, 1866, for many years, at or near the village of Akron, in Erie county, manufactured, from the quarries there, water lime or cement. It was usually placed in barrels and sent into the markets and sold, with a bill pasted upon the barrels. This bill was printed, "Newman's Akron Cement Company, manufacture at Akron, N. Y.; the Hydraulic Cement, known as the Akron Water Lime." This part of the bill is printed in capitals: "Newman's Akron Cement Co.;" and "Akron Water Lime" in large capitals.

The article so manufactured by the plaintiffs had become extensively known, and was very largely used. Its reputation in the markets was well established. It was sold in Buffalo, and in Cleveland, Ohio, and other places in the western states.

One of the defendants had been for some years connected with the manufacture and sale of cement or water lime, in Syracuse, Onondaga county, from a quarry there.

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January 1st, 1866, the defendants became partners, and they re-named the quarry or bed and called it "Onondaga Akron Cement or Water Lime." Prior to this, the word "Akron" was unknown in connection with their business. They shipped lime in barrels to Cleveland, and their agents there used upon the barrels a printed bill, similar in form to that used by the plaintiffs, though not quite so large, thus: "Alvord's Akron (New York State) Water Lime." Then follows the directions for use.

It appears from the evidence that the defendants had not given their agent, in Cleveland, instruction to use such bills; but on learning that there were complaints made, they did instruct their agent to procure and use bills thus: "Alvord's Onondaga Akron Cement or Water Lime, manufactured in Syracuse, in New York." And the defendants insist that they had a right to give to the article they manufactured this name, and that in doing so they have not infringed upon the rights of the plaintiffs. It should have been stated that the defendants used the bills above described only in Cleveland, Ohio.

It seems to me that the object of the defendants in introducing the word "Akron" into their business cannot be mistaken. The plaintiffs had for many years produced from their quarries an article of cement or water lime, and had sold it extensively, in market, as the hydraulic cement, known as the "*Akron* Water Lime." The company's name was "Newman's Akron Cement Company," and their place of manufacture at "Akron, N. Y." Thus the word "Akron" is used three times in their bill, in a natural and proper manner. The article produced by the plaintiffs had been extensively known, and it was bought and sold under the brand, which was well established. What caused the defendants to change the name of their bed or quarry, in January, 1866, and bring in the word "Akron?" There was no place in Onondaga county by that name, nor in the state of New York, so far as I know, except the little village in Erie county. The word has no signification, except as the name

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of a place. It is not of itself indicative of the *quality* of anything. What object, then, had the defendants in introducing this word into their business? Why call the article they manufactured 'Onondaga Akron Cement or Water Lime?' The answer of counsel, upon the trial, was that the defendants had a right to give to their lime bed or quarry such name as they pleased. That they had only given their quarry a name to distinguish it from other quarries in the neighborhood. This answer is not satisfactory, in view of the fact that the defendants knew that there was a place in Erie county known as *Akron*, and that cement was manufactured there and sold in the market as Akron Water Lime, and that it had an established reputation and met with ready sales, especially in Buffalo, Cleveland and other western places. I cannot think that the word "Akron" was adopted by the defendants by accident, or from mere fancy for the word. I have no doubt that the defendants expected to derive a benefit from the use of this word, in the increased sales they should make, founded upon the reputation of the article manufactured by the plaintiffs, and that they were not disappointed in such expectation. If this is so, then I think the plaintiffs should have the relief they ask, unless the settled rules of law are such as to prevent any relief. I have looked into the reported cases, and in my opinion they are not in conflict with my impressions of the justice of this case.

It is not my intention to discuss the law touching trade marks to any considerable extent; but I have considered and will notice the positions of the defendants' counsel very briefly.

The first is, that the word *Akron*, the name of a place, cannot be appropriated exclusively by the plaintiffs. *Wolf agt. Goulard* (18 How. Pr. R. 64), *Burgess agt. Burgess* (17 Eng. L. & Eq. 257), and *Brooklyn White Lead Company agt. Masury* (25 Barb. 416), are cited in support of this position. In the first of these cases, the plaintiff had given to his arti-

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cle the name "Schiedam Schnapps," and the defendant prepared an article and gave to it the same name, in connection with his own name. The parties lived in New York and made their articles there. The judge says: "It was admitted on the argument that the word 'Schiedam,' being the name of a town in Holland, could not be so appropriated by the plaintiff, and that the word 'Schnapps' was adopted from the German language, meaning dram. The judge adds: "When a person forms a new word to designate an article made by him which has never been used before, he may obtain such a right to that name as to entitle him to the sole use of it as against others who attempt to use it for the sale of a similar article; but such an exclusive use can never be successfully claimed of words in common use previously, as applicable to similar articles."

In the next case, the plaintiff had for many years made an article and sold it under the name "Burgess' Essence of Anchovies." His son set up for himself, and manufactured the article and sold it under the same name, his name being Burgess. The judge said: "All the Queen's subjects have a right, if they will, to manufacture and sell articles and sauces, and not the less that their fathers have done so before them. All the Queen's subjects have a right to sell them in their own names, and not the less so that they bear the same name as their fathers; and nothing else has been done in that which is in question before us."

In the other case, the plaintiffs manufactured white lead, in Brooklyn, and marked their kegs "Brooklyn White Lead Company." The defendant also manufactured white lead in Brooklyn, and marked his kegs "Brooklyn White Lead and Zinc Company." It was held that, as both the parties dealt in the same article, and both manufactured it at *Brooklyn*, each had the same right to describe it as Brooklyn white lead.

In my opinion these cases are not in point. It is undoubtedly true that no one "has a right to appropriate a sign or

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symbol which, from the nature of the fact which it is used to signify, others may employ with equal truth, and therefore have an equal right to employ for the same purpose."

This is one of the positions laid down by DUER, J., in the elaborate opinion in *Amoskeag Manufacturing Company agt. Spear* (2 Sandf. S. C. R. 606). When the plaintiff manufactured an article in New York, and gave it the name of a city in Holland, he could not deprive another person, manufacturing a similar article, from connecting the name of the same city with it. So as to Brooklyn; both parties being manufacturers in that city, each party had a right to indicate the place where his article was made. The question in truth lies deeper. DUER, in the opinion referred to, says that in all cases where a trade mark is imitated, the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another; and it is only when this false representation is directly or indirectly made, and only to the extent in which it is made, that the party who appeals to the justice of the court can have a title to relief. No one has the right to sell his goods as the goods of another.

It is also argued that the party complaining must have a right *exclusive* of all other persons, and that in this case other parties, composing a firm, manufactured cement from the beds of lime at Akron, and that they used the same form of bills, inserting the word "Akron." As to the fact in this case, it was proved that this was done with the consent of the plaintiffs. But, aside from this proof, I am not prepared to concur that no more than one person or firm can acquire a right to a trade mark as against all others. The right sought to be protected must undoubtedly be exclusive of the party complained of. I know that, in speaking of the plaintiff's right, the judges speak of it as exclusive, and it must be exclusive of the defendant, or there will be no cause for complaint.

But, keeping in mind the principles upon which the action is founded, I am not able to see why two or more persons,

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or a class of persons, may not have the same right to the exclusion of all other persons. Take this case. The important word to distinguish the article manufactured and sold by the plaintiffs is "Akron," and this is the name of the place where the cement is made, from beds or quarries of lime. The lime in the quarries there is the same in quality, and the process of manufacturing is the same everywhere. Now, as I understand the authorities, the plaintiffs could not probably acquire a right to the use of the word *Akron* by a first appropriation or use, which should exclude his neighbors, manufacturing from the same beds and in the same way, from the use of the word *Akron*; and yet it would not follow that other persons, having no connection with these beds, should not be excluded from the use of the name "Akron." No case has been brought to my attention presenting the question here presented. The important word is the name of the place where the cement is made; but it indicates to the public far more than simply the place of manufacture, as Brooklyn in the case of the white lead. The article manufactured is taken from the earth. It is a bed or quarry of lime. There is no special art or skill in making it into cement. The process is the same everywhere, and yet the cement made from different beds differs greatly in quality and value. The reputation of plaintiffs' cement arises from the reputation of the bed or quarry from which it is made, the *Akron* bed. Now, why may not the persons making cement from these quarries be protected against the fraudulent use of the word "Akron?" To them this word has become valuable. They have long used it with propriety. They speak the truth in using it. They tell the public, by their bills, this is "Akron Lime." It is made from the *Akron* beds or quarries. The public have used it for years, and appreciate its qualities. The defendants, manufacturers of cement in another part of the state, from another quarry, distant some 150 miles, knowing all about the plaintiffs and the article they produce, and its reputation in the market, change the name

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of their quarry, and incorporate the most significant word used by the plaintiffs for many years, and then prepare bills, with this word prominent in them, and bring their article into markets in competition with the plaintiffs. It seems to me that the simple statement of the case is the strongest argument that can be used against the act of the defendants. They intended that their article should be sold, and they expected that it would be bought, as and for the genuine article produced from the quarries at Akron. They expected that the public would be deceived. It is not enough that they used their own firm name, and designated the place of manufacture as "Syracuse," "in New York," and "Onondaga." How many of those who had for years used the plaintiffs' cement knew where it was made? Akron is a small village in a town in Erie county, of no repute, except in connection with the cement or water lime made from its quarries. Most persons, in Cleveland, for instance, on seeing one of the defendant's bills, with "Akron Cement" in large capitals upon it, would, if he stopped to notice "Onondaga" and "Syracuse," suppose that the "Akron Cement" with which he had been acquainted for years was actually made at Syracuse. To him the name of the manufacturer is of no importance. He knows that the quality of the article is derived from the raw material; that is, the bed or quarry; and he understands that the article thus labeled by the defendants is the genuine article which he has long known and used. (*See also Sess. Laws 1862, pp. 513, 514, and Laws of 1863, ch. 209.*) These statutes are very comprehensive.

The injunction granted should be made perpetual. The plaintiffs should have costs.

This judgment was, upon appeal, affirmed at general term.

Hicks agt. Bradner.

COURT OF APPEALS.

RUSSEL F. HICKS, respondent agt. AMARIAH H. BRADNER,
appellant.

In an action for damages for criminal conversation by the defendant with the plaintiff's wife, the wife cannot be a witness against her husband.

January Term, 1868.

THIS action was brought to recover damages of defendant for criminal conversation with the plaintiff's wife, and tried at the Steuben circuit in October, 1860, when a verdict was rendered in favor of the defendant.

Exceptions were taken upon the trial to the rulings of the judge admitting evidence objected to, and judgment having been entered upon the verdict, the plaintiff appealed to the general term of the supreme court; a new trial was ordered and the defendant appealed to the court of appeals.

MILLER, J. It is evident that the judge erred upon the trial in allowing the wife of the plaintiff to be sworn as a witness and to testify against her husband. At common law the husband and wife could not be witnesses for or against each other, and this rule of the common law is not changed by the provisions of the Code which abrogate the disqualification of witnesses by reason of their being parties. These provisions, as they existed when this action was tried, have no application to a case like the one at bar, as has been held in numerous adjudications of the court. (*Hasbrouck* agt. *Vandervoort*, 5 *Seld.* 153; *Smith* agt. *Smith*, 15 *How.* 165; *Marsh* agt. *Potter*, 30 *Barb.* 506; *Macondray* agt. *Wadle*, 26 *Barb.* 612; *White* agt. *Stafford*, 38 *Barb.* 419; *Carpenter* agt. *White*, 46 *Barb.* 291; *Rivenburgh* agt. *Rivenburgh*, 47 *Barb.* 419.) As this error of the judge was sufficient to authorize the general term to grant a new trial, it is not

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necessary to examine the other questions raised, and the judgment of the general term must be affirmed.

All concur.

Judgment affirmed.

NEW YORK COMMON PLEAS.

HARRIET E. CHRISTY, as administratrix of the estate of EDWIN P. CHRISTY, deceased agt. JAMES S. LIBBY, individually and as collector of the estate of EDWIN P. CHRISTY, deceased.

Courts of equity have jurisdiction to call upon executors and administrators to account. Such power was frequently exercised by the late court of chancery, although the surrogate had jurisdiction over such proceedings.

The court of common pleas of the city and county of New York has the same jurisdiction exercised by the late court of chancery in actions, when the defendant resides, or is personally served with a summons, within the city of New York.

The Revised Statutes do not confer on the surrogate *exclusive* jurisdiction over proceedings to compel executors, administrators, or *collectors* to account; an action for such accounting may be brought in the court of common pleas of the city and county of New York.

The *title* is a *part of the complaint*, but the allegations in the *body* of the complaint should control the *title*.

Special Term, December, 1867.

Demurrer to complaint.

The complaint alleges that on the 21st day of May, 1862, Edwin P. Christy died intestate; and that on the 22d day of May, 1862, letters of administration upon the estate of the deceased were granted by the surrogate of New York to the plaintiff; that the plaintiff qualified and entered upon the discharge of the duties of her office as administratrix; that afterwards a contest arose before the surrogate as to the right of the plaintiff to be such administratrix, and during the pendency of the contest the defendant was appointed collector of the estate of the deceased by the surrogate; that the defendant entered upon the duties of his office as collector, and

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as such took possession of certain goods, chattels, moneys and effects of the deceased. The complaint further alleges that the appointment of defendant was only to continue until it was determined who was entitled to administration; that afterwards the contest was decided in favor of the plaintiff, and a decree duly entered confirming the plaintiff's right to administer upon the estate of the deceased, and to the control and possession of all the personal property of the deceased.

The complaint also alleges that before the commencement of this action the plaintiff had demanded of the defendant the property, moneys and effects of which he became possessed as such collector, and that he account therefor to her as such administratrix; and that the defendant refused to do so.

The complaint further shows that a large amount of said property and effects have been converted into money, and that the defendant fraudulently retains possession thereof, and of all said property and the proceeds thereof; that the defendant has, by neglect and mismanagement, lost a large amount of the personal property and effects of which he became possessed as such collector, and has lost by his omission and neglect a large amount of other personal property to which he was entitled as such collector; to all of which plaintiff, as such administratrix, claims to be entitled.

Plaintiff demands judgment against the defendant, that he account to her for all the personal property, moneys and effects which have come into his possession and to which he was entitled as such collector, that he be ordered and directed to deliver to her, as such administratrix, all the personal property and effects still remaining in his possession; and that he pay to her, as such administratrix, all moneys in his possession and to which he is entitled as such collector; that he pay to her, as such administratrix, the value of all personal property and effects which have been lost through his mismanagement or neglect.

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The defendant demurs to the complaint and asserts the following grounds of demurer.

First. That it appears upon the face of the complaint that this court has no jurisdiction of the subject of this action; that the defendant was appointed collector of the estate of the deceased by the surrogate of the county of New York, and that the surrogate's court is the proper forum in which to adjust the accounts and control the proceedings of its officers and the persons deriving authority from that court.

Second. That several causes of action have been improperly united—one being an action for accounting as collector and special administrator, and the other an action for alleged negligence or mismanagement in conducting a trust whereby the plaintiff seeks to recover the value of personal property and effects alleged to have been lost through the defendant's mismanagement.

Third. That the complaint does not state facts sufficient to constitute a cause of action.

AMOS G. HULL, *for defendant, in support of demurrer.*

C. BAINBRIDGE SMITH, *for plaintiff, opposed.*

VAN VORST, J. Executors and administrators are considered as trustees. The defendant, as collector of the estate, appointed by the surrogate during the contest in his court as to the plaintiff's right to administration, stands in relation to the estate as a trustee.

Courts of equity take cognizance of the conduct of executors, administrators and other trustees. (*Blackstone's Com.* vol. 3, 437; *Willard's Equity Jurisprudence*, pp. 88, 490.)

Courts of equity have jurisdiction to call an executor or administrator to account; and the power to summon trustees of this character for this purpose was frequently exercised by the late court of chancery in behalf of creditors, legatees, or distributees of an estate, although the surrogate's court had concurrent jurisdiction over those matters. In

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Rogers agt. King (8 *Paige*, 211) the chancellor says: "This court, upon a proper application, would grant an injunction as a matter of course, to stay any creditor or others from proceeding before the surrogate, and to compel them to come in and establish their claim under the decree here."

The court of chancery would exercise such restraining power from proceeding in the surrogate's court, where a bill had been filed in that court for an accounting,

A court of equity is a tribunal in which not only the personal fitness and conduct of a trustee may be investigated, but in which his administration of the trust property may be overlooked on a charge of waste or devastavit, and he may be ordered to account for the property received by him and to pass and settle his accounts.

A court of equity has always exercised jurisdiction in such cases. It is inherent to it.

The defendant having had only a temporary relation to the estate of the deceased, to be ended so soon as it could be determined who was to be clothed with legal power to take the property as a trustee, was liable to account to the person who should ultimately be appointed as a proper representative.

The collector should account to the party legally appointed as administratrix, for the property, money and assets which has come into his hands while he was collector, and for his management of the trust estate, and for property lost by his management or neglect of duty. A case of this character is a proper subject for the cognizance of a court of equity.

The court of common pleas of the city and county of New York has the same powers exercised by the late court of chancery in all *actions* where the defendant resides or is personally served with a summons within the city of New York. (*Code*, § 33, *sub. 2*; *Brown agt. Irish Presb. Cong.* 6 *Bosw.* 246.)

As the court of chancery could have entertained jurisdiction of this action, this court may. It is true that the sur-

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rogate of New York has jurisdiction to summon this defendant to account, and to oblige him to make an exhibit of his affairs as collector of this estate, and may make a valid decree in the premises on a state of facts such as is set up in the complaint in this action. (*New York Statutes at Large (Edmond's edition) vol. 2, pp. 229, 230.*)

But it was not designed that the jurisdiction of the surrogate should be *exclusive*. There is nothing in the statute which tends to show that the legislature intended to take away from courts of equity their jurisdiction over cases of this character.

In *Seaman agt. Duryea* (11 N. Y. R. 324) it is said that, "It was the intent of the legislature, in conferring this jurisdiction upon surrogates, to provide an inexpensive and summary process for the settlement and adjustment of the accounts of executors and administrators, and to supersede the necessity of a resort to the court of chancery for that purpose."

All that was meant to be decided in that case upon this point was that a party was not of *necessity* obliged to go into a court of equity in cases of the character designated.

If a party elected, there was a tribunal open to him in which he could take a more summary and inexpensive method than by resorting to the court of chancery. If it had been intended that the surrogate should exercise exclusive jurisdiction, it would have been so stated.

I have no doubt about the jurisdiction of this court to entertain this action. This disposes of the first ground of demurrer.

There is really but one cause of action set up in the complaint.

The matters alleged have relation to the defendant in his character as collector and trustee only.

Defendant is asked to account for what he has received, and for what has been lost through his misconduct and negligence as *collector*. His conduct and administration as trus-

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tee, during the time he held the office of collector, is the subject of inquiry. In the title of the complaint he is described "individually," as well as "collector." The title, it is true, is part of the complaint. (*Code*, § 142.)

But the allegations in the body of the complaint should control the title. By them he is sought to be charged as collector, and it is in that relation only that he is brought into court.

It is not claimed that he, otherwise than as collector, has interfered with the property and estate of the deceased. He is not proceeded against as a trespasser.

The last ground of demurrer is involved in the consideration of the first and second.

If the preceding views are correct, the complaint does set up a cause of action.

Judgment for plaintiff on the demurrer, with leave to defendant to answer in twenty days, on payment of costs.

SUPREME COURT.

JOHN H. SHERWOOD agt. RICHARD B. CONNOLLY, Comptroller, and others.

JOSEPH B. VARNUM, JR., agt. CHAUNCEY M. DEPEW and others.

None of the expenses of the *board of audit* for the city and county of New York, and none of the claims covered by it, can be paid, except out of a fund directed by the act creating the board (1867) to be raised for that purpose by the board of supervisors, by tax.

So long as the supervisors refuse to raise such fund, no damage can ensue to any tax payer, and he is not entitled to an injunction to restrain the action of the board of audit, even assuming the act under which they were created to be unconstitutional.

There is no remedy given under the provisions of section 3, chapter 405 of the laws of 1864, against such a body as a board of audit.

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That section only gives a remedy in behalf of a tax payer, a member of the common council or a supervisor, *against the common council or the supervisors.*

New York Special Term, May, 1867.

BARNARD, J. Whatever may be the force of the objections urged to the constitutionality of the act in question, still this action is premature.

Assuming that portion of the act which creates and defines the powers of the board of audit to be unconstitutional in all its parts, still I do not see how the plaintiffs or the citizens of New York city can be damaged by the board's proceeding, unless the supervisors lend their aid in carrying out the act by levying a tax sufficient to cover the expenses of the board and the amount of the claims reported by it to be due from the city.

None of the expenses of the board of audit, and none of the claims covered by it, can be paid, except out of a fund directed by the act in question to be raised for that purpose by the board of supervisors by tax. No damage then can ensue, if the supervisors refuse to raise this fund.

If, however, they improperly proceed to raise the fund (and, if the act is unconstitutional, the acting on the report of the board of audit would be improper), then injury would be likely to result. A remedy may be had under section 3 of chapter 405, laws of 1864. For another reason this injunction should be dissolved. Unless the provisions of section 3 of chapter 405 of laws of 1864 apply, the plaintiffs clearly have no standing in court.

The provisions of that section only give a remedy in behalf of a taxpayer, a member of the common council or a supervisor, against the common council or the supervisors; there is no remedy given against such a body as the board of audit. I have not deemed it necessary, at this stage of the proceedings, to pass upon the various questions that have been raised by the plaintiffs' counsel. At some future period of time, if it should become necessary, these questions can be met and decided. At present, in consequence of the

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interposition of the technical objection before passed upon, it would be anticipating that which is not properly before me, and which would not bind the parties, as it would be anticipating that which may never arise.

Motion for injunction denied.

NEW YORK COMMON PLEAS.

In the Matter of the Petition of BERNARD SMYTH, Receiver of Taxes, agt. THE INTERNATIONAL LIFE ASSURANCE COMPANY of London.

A foreign corporation doing business in this state is to be regarded as non-resident; and it is to be assessed and taxed upon all moneys in any manner invested in this state, the same as if it was a resident corporation; and the securities deposited with the comptroller are personal property, liable to taxation. Such an insurance corporation cannot exempt itself from this taxation, on the ground that it is not doing business in this state, by alleging and proving that it is now confined to collecting premiums and paying losses on old policies; and that it issues no new policies. This must be considered "doing business," within the meaning of the statute, although it may be contracted.

The remedy by the receiver of taxes, for the collection and payment of such taxes from such corporations, is the same as against individuals.

Special Term, April, 1868.

THIS was a proceeding to enforce the payment of tax upon personal property imposed upon the International Life Assurance Company of London.

This company has heretofore been taxed in this state as a foreign corporation doing business here. The act of 1860 authorizes any foreign corporation, organized under foreign laws, to do business in this state, upon depositing with the comptroller, for the benefit of the policy holders, securities to the amount of \$100,000; and a subsequent act provides that "All persons doing business in the state of New York, who are not residents, shall be assessed and taxed upon all sums invested in said business, the same as if residents of this

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state." The court of appeals held, in an action against the company, that a foreign corporation doing business in this state is to be regarded as non-resident; and that it is to be assessed and taxed upon all moneys in any manner invested in this state, the same as if it was a resident corporation; and that the securities deposited with the comptroller are personal property, liable to taxation. The company now resists payment of tax upon the amount for the past year, on the ground that they are not doing business in this state, their agent testifying that the business of the company was now confined to collecting premiums and paying losses on old policies, and that they issued no new policies. This, it was contended, was not "doing business," within the meaning of the statute.

ABRAHAM R. LAWRENCE, JR., and
A. J. SMITH, for petitioner.

First. That portion of the deposit which the defendants have made with the superintendent of the insurance department, which consists of bonds and mortgages, is liable to taxation, as the capital of the defendants and as a sum invested in their business. (*The International Life Ins. Co. agt. Com. Taxes, Supreme Court, 28 Barb 318; British Com. Life Ins. Co. agt. Com. Taxes, Court of Appeals, 28 How. Pr. R. p 41; Laws of 1855, p. 44, ch. 37; Laws of 1853, § 15, ch. 463.*)

Second. It is admitted that the principal place of business and office of the defendants is situated in the first ward of the city of New York, and consequently the authority to tax the defendants in this city cannot be disputed. (*Lawrence's Tax Laws, p. 7; 1 R. S. 909, 5th ed.; see cases cited supra, and 31 N. Y. p. 32; Holbrook's affidavit.*)

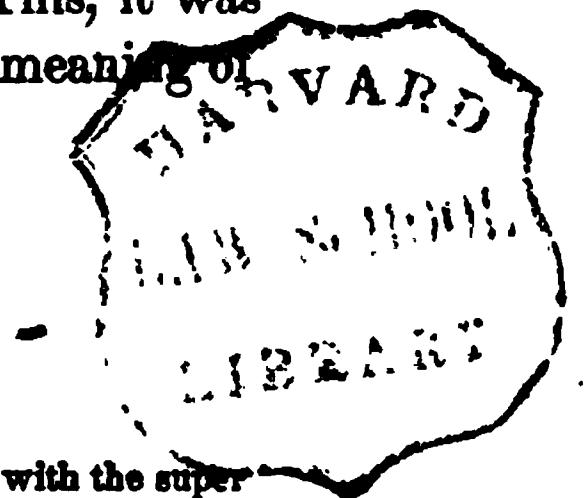
Third. It is not competent for the defendants in this proceeding to question the validity of the tax, inasmuch as their remedy was by a *certiorari*, under the act of 1859, to review the assessment made by the commissioners of taxes and assessments. (*Lawrence's Tax Laws, p. 91, § 20; Laws of 1859, p. 678.*)

Fourth. The pretence that the defendants are not doing business in this state is not justified by the papers which are before the court. The defendants, according to their own showing, are engaged in receiving premiums on policies heretofore issued, and in paying such losses as they may sustain.

The fact that they do not issue any new policies, or, in other words, do not increase their business, does not aid them. The receiving of premiums is the transaction of business.

Fifth. As to the proceeding to compel the payment of the tax, see *Lawrence's Tax Laws, p. 60.*)

Sixth. The word person, when used in tax statutes, includes a corporation. (*United States agt. Amedy, 11 Wheat. 392; People agt. Utica Ins. Co. 15 John. 358; Statu*



Smyth agt. International Life Assurance Company.

of *Indiana* agt. *Woram*, 6 *Hill*, 33; *Angell & Ames on Corporations*, pp. 472, 473, § 441.)

J. W. GERARD, JR., *for respondent*.

BARRETT, J. The objections to the petition, and all other technical objections, are sufficiently answered by the reference to Judge BRADY's opinion in the matter of *Kelly's Application* (10 *Abb. Pr. R.* 209).

1. The proceedings have been conducted in strict conformity to the views there expressed.

2. There is nothing in the point that the receiver is authorized by the act of 1867 (*Session Laws*, p. 752, § 11) to proceed by suit. That provision is specially applicable to individuals as well as corporations, and is plainly cumulative.

3. It is too late for the defendants to object to the legality of the tax; nor can that question be considered here. The remedy was by *certiorari* to review the assessment made by the commissioners. It must be assumed, therefore, that the tax was justly imposed, and that the defendants were possessed at the time of the amount of personal property referred to in the petition. But, were the question open to review, the following authorities and statutes would seem to be decisive against the position taken by the defendants: *British Com. Life Ins. Co. agt. Com. Taxes*, 28 *How. Pr. R.* 41; *International Life Ins. Co. agt. Com. Taxes*, 28 *Barb.* 318; *Laws of 1853*, ch. 463, § 15; *Laws of 1855*, ch. 37. The case of the *People agt. The New England Mutual Life Ins. Co.* (26 *N. Y.* 303) had reference only to corporations organized under the laws of the other states of the Union, and not to those of other countries.

4. The bonds and mortgages on deposit with the superintendent of the insurance department are assets of the company. They are choses in action, upon which levy cannot be made according to law, and are applicable to the payment of the tax.

5. The company is still transacting business in this city,

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and the bonds and mortgages so on deposit are a substitute for the capital of our own corporations. They constitute the security which our laws compel the defendants to afford to their creditors here. The fact that no new policies are issued does not involve a cessation or liquidation of the business.

The business of accepting yearly premiums upon outstanding policies, and of paying the losses which may accrue thereon, still continues. The utmost that can be claimed is that the business has been contracted, and that its area is being further limited by the company, so that it is in a fair way, in case such policy be adhered to, of gradual extinction.

6. The only difficulty, in my mind, is in reference to the enforcement of the tax by the present proceedings. But a careful examination of the various statutes referred to has convinced me that the order for payment should be granted without considering, upon this application, the question as to whether it will be practically effectual. That is a matter which the applicant has doubtless considered, and upon which, as it may form the subject of another application, I express no opinion. It is clear, however, that the legislature intended to authorize the collection of the tax by the same summary proceedings as those applicable to individuals. By the laws of 1862 (*ch.* 152, *p.* 319), sections 18, 19, 20 and 21 of the act of 1843 (*ch.* 230, *p.* 314) were repealed. These sections provided for the sequestration of the property of corporations, in case of the inability of the receiver of taxes to collect the tax imposed. By the repeal of these sections, corporations are left in the same category as individuals, and the provisions of section 15, to the effect that the receiver, in case of the non-payment upon demand of the taxes assessed upon incorporated companies in the city, shall proceed in the collection and payment thereof in the same manner as in other cases, clearly, and without the previous ambiguity consequent upon the seeming conflict with other

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sections, subjects these companies to the same proceedings as those provided for individuals. By permitting sections 16, 17, 18, 19 and 20 of title 3, chapter 13, part 1 of the Revised Statutes to remain unrepealed, the legislature unmistakably indicates its intention of confining the change of remedy to corporations in this city; for these latter sections are very similar to those contained in the act relative to the collection of taxes in the city of New York, and they still continue, so far as I have been able to discover, unrepealed, and applicable to the collection of taxes from corporations located elsewhere in the state.

An order must therefore be made requiring the payment of the tax.



N. Y. SUPERIOR COURT.

JACOB BRETZ agt. THE MAYOR, &c., of the City of New York.

The act entitled "An act to enable the board of supervisors of the county of New York to raise money by tax for the use of the corporation of the city of New York, and in relation to the expenditure thereof; and to provide for the auditing and payment of unsettled claims against said city, in relation to actions at law against said corporation," passed April 23, 1867, is a *public statute*, and need not be *pleaded* to give the court jurisdiction to notice it.

General Term, May, 1868.

THIS is an appeal taken from an order made at special term by one of the justices of this court, giving judgment for plaintiff overruling demurrer of the defendants to plaintiff's complaint, with leave to answer on the usual terms.

The plaintiff claims to recover damages for injuries sustained by him on the 2d day of December, 1867, setting out in his complaint that defendants negligently left, on the Eighth avenue, openings in the street and obstructions, without signals or lights indicating danger, whereby the plaintiff

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in the night time was thrown from his vehicle and injured. To this complaint the defendants demurred, assigning as the only ground that this court had no jurisdiction of the action. The defendants cite section 6 of chapter 586 of the laws of 1867, which is * * * * * and hereafter all actions against the mayor, aldermen and comonalty of the said city shall be brought in the supreme court of the first judicial district, which court shall have exclusive cognizance of such actions.

The opinion given at special term adversely is as follows:

MONELL, J. The act referred to is not pleaded, but I am asked to take judicial cognizance of it as a public statute. The immediate question before me, therefore, is whether such statute is a public or a private or local law. No objection is urged to the complaint, other than that the act referred to has deprived this court of jurisdiction of any action against the corporation of the city of New York. The question of the validity of the act, as conflicting with section sixteen of article three of the constitution of the state, that "no private or local bill, which may be passed by the legislature, shall embrace more than one subject, and that shall be expressed in its title," is not properly before me at this time; and I have therefore confined my examination to the only question which is before me. General or public acts are such as relate to or concern the interests of the public at large, and private acts are such as relate to private individuals, or which concern a particular *species* of some general *genus* or thing. Such are the definitions given in *Smith's Commentaries on Statutes* (sec. 795), and in *Dwarris on Statutes* (vol. 2, p. 464). In his enumeration of public acts, they specify those concerning the King, Queen, or Prince, or in the American states, the government and its co-ordinate departments; those concerning the whole spirituality; acts concerning trade in general, or which relate to all subjects of the realm; acts which concern all persons, though of a special nature, such as acts concerning assizes, or woods, or

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forests, chases, fisheries and private acts, when recognized by a public act. And in the enumeration of private acts, are such as relate to a particular place, or to divers particular towns, or to one or divers particular counties, &c. Other acts which in their objects and operation are merely local or limited, are nevertheless treated as public acts, either by virtue of a special clause declaring them to be so, or because, although limited to a particular section or locality, yet they affect the public at large when acting within that section or locality, in reference to matters within the purview of the act. (*Holland's case*, 4 Co. 76 a.) "The distinction," says *Blackstone* (1 *Black. Com.* 86), "between public and private statutes is this: A general or public act is a universal rule that regards the whole community, but a special or private act is rather the exception than the rule." There are statutes which are local in one sense, which are nevertheless public statutes; for it is not necessary to constitute a statute a public act that it should be equally applicable to all parts of the state. It is sufficient if it extends to all persons doing or omitting to do an act within the territorial limits described in the statute. In *Pierce agt. Kimball* (9 *Greenleaf*, 54), an act which provided for the survey of timber in the county of Penobscot, and prohibited sales unless thus surveyed and marked, was held to be a public act, as it operated upon all persons. So an act for the preservation of fish in a particular river was pronounced a public act, inasmuch as it was obligatory upon all citizens. (*Burnham agt. Webster*, 5 *Mass. R.* 266.) A similar decision was made in *Jenkins agt. Union Turnpike Co.* (1 *Caines Ca.* 86), where the act incorporating the company contained a clause vesting the road, on a certain event, in the people, and for that reason it was held to be a public act. And in *Bank of Utica agt. Smeeds*, (3 *Cowen R.* 684), the chancellor intimated that the act authorizing the bank to establish a branch office was a public act, because the act incorporating the bank declared it to be a public law. The point, however, was not decided.

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Again, the act authorizing the railroads of the state to subscribe to the capital stock of another designated railroad was pronounced to be a general law, as it applied to all railroad corporations. (*White* agt. *Syracuse and Utica Railroad Co.* 14 Barb. R. 559.) But an act of Congress relative to insolvent debtors within the District of Columbia was held to be only a private statute, of which the state courts were not bound to take notice (*Wright* agt. *Patin*, 10 John. R. 300). Indeed all the local statutes which have, as far as my observation has gone, been declared to be public statutes, were either penal statutes affecting all citizens who might offend, or statutes of a remedial character, where all persons might come within their purview (*Pierce* agt. *Kimball*, *abi sup.*; *Hendia* agt. *Agres*, 12 Pick. R. 344). In the case of *The Sun Mutual Insurance Co.* agt. *The Mayor, &c., of New York* (8 N. Y. R. 4 Seldon, 241), the validity of an act similar to the one I am considering, passed in 1850, was considered; and although it was not declared in that case that the act of 1850 was a private law, yet such result necessarily followed from the decision, which was that the act did not conflict with the constitutional provision to which I have already referred. If the court had pronounced the act a public statute, the point decided could not have arisen. The case may therefore be regarded as an authority. In two cases also recently decided—one in this court, *Smith* agt. *The Mayor, &c.*, the other in the supreme court of this district, *Pulman* agt. *The Mayor, &c.*, the same view has been taken. The title of the act under consideration, as well as the subjects embraced in it, are of a purely local nature. It is an act to enable the local authorities to raise money by tax for the use of the corporation of the city. It empowers the board of supervisors of the county to cause to be levied and raised by tax, upon the taxable property of the county, for the use of the mayor, aldermen and commonalty of the city of New York, an amount equal to the several sums thereafter stated. Then follows the several sums needed for the support of the city government.

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The act is not penal. It relates exclusively to the raising of money by tax levied upon property belonging to the inhabitants of New York, or such as own property therein; which money is appropriated to the support of the city government. Its operations are confined to this county, and it has no effect even of the remotest character in any other part of the state, or upon the people of any other place. It is an enabling act, necessary for the administration of local government, and relates to and affects the interests of this county exclusively, and in which no other part of the state can have any concern. Nor can it be questioned by any others than those who are thus immediately affected by it. By its title, therefore, as well as in all its provisions, in the effect to be given to them, and in the interests it involves, it is within the definitions I have given, as local and private a law as any that could be enacted. If I am correct that this act, commonly called "the tax levy," is a local statute, then it should have been pleaded, and I cannot take judicial notice of it. My decision goes no further, as I have not deemed it either necessary or proper to look into the act to see whether it is or is not exposed to the constitutional objection urged upon the argument. That question can be determined when the act is formally brought to the notice of the court.

There must be judgment for the plaintiff upon the demurrer with costs, with leave to the defendants to withdraw the demurrer and answer the complaint on payment of costs.

A. H. REAVY, *for plaintiff.*

RICHARD O'GORMAN, *for defendants.*

By the court, GARVIN, J. This case comes before us on appeal from an order made at special term, overruling a demurrer to the complaint and ordering judgment for the plaintiff. The defendants insist that this court has no jurisdiction of the action, claiming that section 6 of laws of 1867

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(*ch.* 586), in all actions against the mayor, aldermen, &c., of the city of New York, confers exclusive jurisdiction upon the supreme court, and thus precludes this court from entertaining the case. The plaintiff contends that the statute is private and local, and not being set out or referred to in the pleadings, the court will not regard it.

As to private and local enactments, this is the rule. Therefore, whether the sixth section is a public or private and local statute, is the question, not whether the act is private or local in its principal provisions. An act of the legislature may be local and private in many of its provisions, and yet contain an enactment which is neither local nor private. (*Williams agt. The People*, 24 N. Y. 406.) If a public statute, the courts are bound to notice it. If this court has no jurisdiction of the action, the demurrer must be sustained so far as this particular question has any influence upon its action. But if for any cause the act itself, or this enactment, is unconstitutional, then the decision made by the court at special term is right. If the section is unconstitutional, it is void, and the jurisdiction of the court remains the same, unaffected by the enactment.

The clause of the section in question provides that hereafter all actions against the mayor, aldermen and commonalty of the city of New York shall be brought in the supreme court, which court shall have exclusive cognizance of such actions. The supreme court had jurisdiction of such actions before 1867, but by this provision that jurisdiction is now exclusive. It is enacted not only that all actions against the corporation shall be brought in, but that court shall have exclusive jurisdiction thereof. The legislature intended to effect two purposes: (1.) to confer exclusive jurisdiction upon the supreme court; and (2.) to absolutely take from every other court in the state, in the first instance, the power to entertain any action wherein the corporation of the city of New York are defendants. It is essentially public in its object and purposes. We are not without authority upon the

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question. It has been held in *People* agt. *McCann* (16 N. Y. R. 61), that an act local in its general provisions, may contain a section which is public in its character, as contradistinguished from one private or local. That section contained provisions in relation to the courts of oyer and terminer of the state generally. It was held to be a public statute.

This principle is approved by DENIO, Judge, in *Williams* agt. *The People* (24 N. Y. R. 407). Can it be said an enactment referring to one class of criminal cases is public and another in regard to a class of civil cases is private, when each prescribes a rule by which parties and courts are to be governed, neither imposing either penalty or forfeiture? I think not. A further examination of the case may be useful, putting the case in a still stronger light. All courts are bound to look to and take notice of provisions touching their powers and jurisdiction, whether found in the constitution or statutes of the state. This court derived its powers originally from the statutes enacted by the legislature. Its continuance, with the powers and jurisdiction then possessed from the constitution of 1846, "until otherwise directed by the legislature." There can be no doubt of the power of the legislature to add to or take from the power and jurisdiction of the court. The addition of the last clause of section 6, by way of amendment to the act organizing the court, would deprive the court of jurisdiction of all actions against the city, just as clearly as if it had been in the original statute. Must not the court take judicial notice of the act bringing it into existence, defining its powers, and all provisions enlarging or restricting its jurisdiction? The court of errors, in *Morris* agt. *The People* (3 Denio R. 399), in regard to the act declaring the arrears of the salary of a judge of the court of general sessions a county charge, and directing the board of supervisors to audit and allow it, held it was not an appropriation of money for "local or private" purposes, and there was no force in the objection that it was a bill appropriating the public moneys for "local or private purposes," and did not

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require a two-thirds vote to pass it (§ 9, art. 7, Const. 1821). The same principle was reiterated in *Conner* agt. *The Mayor* (5 N. Y. R. 285), changing the mode of compensating the county clerk of New York (among other officials), by the payment of a salary in lieu of fees. "Acts concerning all persons generally, are deemed public as distinguished from private acts, though it be in regard to a special or particular thing, such as a statute concerning the circuit court, oyer and terminer, woods in forest" (*Bacon's Ab. Title Stat. F*).

The same rule is laid down in *Williams* agt. *The People*, DENIO, Judge, says: An enactment which "prescribes the rule of conduct for all persons, whether residents in the city or any other portion of the State," is a public and not a private statute, because incorporated in the same act containing local provisions. There certainly can be no doubt about its constitutionality, if it is a public statute. The application of these principles to the case under consideration is obvious.

The order below should be vacated, and judgment ordered for the defendants upon the demurrer, without costs.

MONELL, J. Since the demurrer in this case was decided by me at special term, my attention has been drawn to the case of *The People* agt. *McCann* (16 N. Y. R. 58), which, as a decision of the court of last resort in this state, is controlling upon the only point noticed by me. That case, although cited by the defendants' counsel, was not specially called to my attention on the argument of the demurrer at special term. A re-examination of the case upon the appeal from my decision, has led to a careful perusal of the case of *The People* agt. *McCann*, and as it seems to me to very clearly hold that a provision of a public nature inserted in a local act does not render the latter unconstitutional and void, I am, of course, bound to follow and adopt the law of that case.

I have no doubt that the provisions contained in section 6

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of chapter 586 of the laws of 1867, standing by themselves, are of a public nature. They relate to actions against the corporation of the city of New York, and confine jurisdiction over such actions to the supreme court. There is, however, no restriction upon the right to sue by any person having a cause of action, and therefore every person is, or may be, brought within the purview of the statute, though he may not select the forum or tribunal where he will bring his action. These provisions are not unlike those which, in *The People* agt. *McCann* were held to be of a public nature.

As the decision at special term was placed solely on the ground that the act referred to was a private and not a public statute, of which the court would not take judicial notice, and as that objection is now removed by the authority of the case I have cited, it leaves any other objections to the statute open for examination. I fully concur in the view expressed by my associate, Mr. Justice GARVIN, that the superior court, deriving its jurisdiction and powers wholly from the legislature, may be deprived of such jurisdiction at the pleasure of the legislature; and that therefore it was competent for the legislature, by conferring jurisdiction over actions against the corporation of the city of New York to the supreme court, to confer all jurisdiction over such actions. I somewhat more at large expressed my views on this subject in the recent case of *Burnham* agt. *Acton*. It has been suggested that the statute of 1867 is in conflict with the provisions of the constitution, that "all corporations shall have the right to sue and shall be subject to be sued in all courts in like cases as natural persons" (*Const. art. 8, § 3*); but I think, without considering the doubt whether municipal corporations are included in the constitutional provision, that it is very clear that it was only intended to subject corporations to the jurisdiction of such courts as had jurisdiction at the time the corporation was sued, and not to deprive the legislature of the power of diminishing or wholly destroying the powers of any court

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not created or protected by the constitution. Such power of the legislature cannot be taken from it by implication merely. But corporations are subject to be sued in all courts in like manner as natural persons; and jurisdiction over such persons has frequently been enlarged or diminished by the legislature.

The general power of the legislature over courts of local or inferior jurisdiction was considered in *ex parte McCallum* (1 Comst. 555, 567), and the power of the legislature was there recognized and sustained.

I concur in reversing the order overruling the demurrer.

NEW YORK COMMON PLEAS.

• EVERETT P. WHEELER agt. PETER GILSEY and another.

A person cannot have an *easement* over his own land.

Where a person owning a large plot of ground in the city of New York, makes a way over it from his dwelling to communicate with the open thoroughfares of the city, and uses such way over his own ground for a period of thirty years, and the plot is afterwards subdivided into and sold as city lots, a purchaser of a lot at such sale with *the dwelling thereon*, cannot claim by *prescription* a right of passage over the lots, part of such plot, purchased by others at such sale, on account of the original owner's use of the road in question.

A purchaser at such sale of an inner lot, with the dwelling thereon, may claim a right of way by *necessity* over the lots which lie between him and the *open streets* of the city, and for such purpose may pass over the road used by the owner of the plot before the same was divided into city lots.

The *necessity* out of which a right of way arises is strict, and should continue only as long as the necessity exists.

Where an *easement* is annexed to a private estate, the due enjoyment will be protected by injunction.

Section 7 of article 1 of the constitution of the state of New York of 1846, does not apply to the case where a right of way arises by necessity.

Where a person is restrained by an order of injunction from performing an act on *his own land*, and stands by and suffers another to perform the act which he could prevent, he is guilty of a violation of the injunction.

Special Term, November, 1867.

On the first of May, 1864, Edward Belknap was seized

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and possessed of a parcel of land, with a dwelling house thereon, situate in the city of New York, bounded on the north by the centre line of Eighty-fourth street, on the east by the East river, on the south by the land of George Jones, and on the west by the center line of Avenue B. The dwelling house, which was occupied by Belknap as a residence, was situated near the southerly part of the land. There was leading from the dwelling house of Belknap a road or way, running northerly to the intersection of Avenue B and Eighty-fourth street. The road, through its entire length, passed over the lands of Belknap. It was a private way used by Belknap, as a means of access to his dwelling to and from the public streets. Neither Avenue B nor Eighty-third street are open to the public. Eighty-fourth street is open to a point near its intersection with Avenue B, where the road in question leading from Belknap's house communicates with it. Belknap, the owner of the land over which the road passed, had used this way as a means of egress from and access to his said dwelling house. The road in question had been used for such purpose for a period of about thirty years, and was the only means of communication between Eighty-fourth street and the dwelling house.

In May, 1854, Belknap executed a mortgage covering this entire parcel of ground; and in April, 1864, the plot of ground was subdivided into city lots and sold at public auction by the sheriff of the city of New York, in pursuance of a judgment made in an action for the foreclosure of said mortgage. At such sale made by the sheriff, William Neilson purchased five of said lots lying on the south side of Eighty-third street, which street, running through the plot of ground, is not yet opened. The dwelling house in question formerly occupied by Belknap, went with such purchase. Neilson afterwards purchased several of said city lots on the north side of Eighty-third street, in front of said dwelling house, and over which the road in question passes. The defendant Gilsey became and is the owner of four of said

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city lots, part and parcel of the property of Belknap, situate on the southerly line of Eighty-fourth street and directly north of the lots last above described as purchased by Neilson. The road in question so used by Belknap for the purpose aforesaid passes over one of said lots purchased and owned by defendant Gilsey. Neilson, after the acquisition by him of the title to the lots and the dwelling house above mentioned, part of the land of Belknap, used the road above described as a means of getting from the dwelling house to Eighty-fourth street, and which was the only road in use for reaching the open streets from said dwelling.

This road was so used at the time Gilsey purchased the lots on the south side of Eighty-fourth street, over one of which lots the road passes.

On the 20th day of May, 1867, Neilson granted and conveyed to the plaintiff the four lots of ground on the south side of Eighty-third street, with the dwelling house aforesaid with the appurtenances. The conveyance to the plaintiff contained, among other things, a grant to the plaintiff of "*whatever right of way the party of the first part (Neilson) may have to Eighty-fourth street from said dwelling house.*" In the conveyance to Neilson by the sheriff, there was no grant to him in terms of a right of way over the lands of Belknap, lying north of the lots purchased by Neilson, but he continued to use the road above described after his grant to plaintiff, as he had before, up to the month of September, 1867, when he delivered up the possession of the dwelling to plaintiff, who has since been in the actual use and occupation of the dwelling as a residence.

Plaintiff, after going into the dwelling, commenced to use said way as it had been theretofore used by Belknap and Neilson, as a means of getting to and from his dwelling, and for this purpose passed over that portion of the land formerly owned by Belknap, to which defendant Gilsey had acquired title.

It appears by the papers in the case, that plaintiff has no

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way to go to and come from his dwelling with horses, carts, or carriages, so as to communicate with or enter any street or highway open to the public, except over said road.

In the early part of October, 1867, preparations were made by some parties to build a fence across the southerly line of the lots of the defendant Gilsey, so as to shut up said road. Holes were dug in several places, for the purpose of putting fence posts therein, and of so obstructing the road as to render it impassable, and to cut off all means of travel over it by the plaintiff. Plaintiff remonstrated against the contemplated act of closing the road.

To prevent the closing of this road the plaintiff commenced this action, and in his complaint alleges that the defendants are the parties who are engaged in the construction of the fence and threaten to complete it, and he asks that they be prevented by injunction from fencing up and obstructing said road. Plaintiff alleges that the shutting up of the road would work irreparable injury to him and to the inheritance, and that his access to and from said dwelling occupied by him *with horses, carts and carriages would be entirely* cut off and destroyed, and that the same could *no longer be used as a dwelling*.

An injunction order was issued, according to the prayer of the complaint, and the same was served on the defendant Gilsey on the 4th day of October, 1867, and on the defendant Kilpatrick, who, it is alleged, was engaged in the work on the fence on the 11th day of October, 1867.

Notwithstanding the commencement of this suit and the service of the injunction order, the fence has been erected since the service of the complaint and injunction order on defendant Gilsey.

The defendant Gilsey, in his answer to the complaint, among other things, denies that the road in question ever existed otherwise than as the private road or entrance of Belknap over his own grounds. He avers that he purchased the lots owned by him from Mary Irving, who, as defendant

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avers, is engaged in putting up the fence on his land, in pursuance of her contract made with him at the time he purchased the property from her.

The defendant, in his answer, also says that he had no intention or design of so inclosing the lots owned by him, as to prevent the plaintiff's ingress or egress to and from his house to Eighty-fourth street; but that *he expressly offered twelve feet upon the westerly part of his land through* and upon which he might pass from his house to Eighty-fourth street.

The road has, however, been closed by the fence, and it appears by the affidavit of the plaintiff that the defendant Gilsey, before the commencement of this suit, had informed him that he intended to and would put a fence across said road, so as to shut up the same.

Plaintiff now moves that the defendants be punished for a contempt in violating the injunction, and asks for an order that the fence be removed. Defendant Gilsey moves, at the same time, that the injunction be dissolved.

E. P. WHEELER *and* JOHN W. EDMONDS, *for plaintiff.*

H. M. WHITEHEAD *and* HENRY L. CLINTON, *for defendants.*

VAN VORST, J. A right of private passage over another man's ground is an incorporeal hereditament. It may arise either by grant of the owner of the soil, or by prescription which supposes a grant, or from necessity. (*Washburn's Easements*, p. 161, *Kent's Com.* vol. 3, p. 420.)

The right in question claimed by plaintiff does not arise either by grant or prescription.

The deed which the sheriff executed on the public sale of the property of Belknap to Neilson, the grantor of the plaintiff, did not purport in terms to make any such grant. Nor was there in the conveyance to the defendant Gilsey from his grantor, any easement or right of way reserved in favor of the owners of the adjoining lands.

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The right claimed by the plaintiff therefor does not arise by the express terms of the conveyance to him, nor does it arise by prescription. It is true that Belknap, during all the period he owned the land, used the road in question as a means of egress from his dwelling to Eighty-fourth street, and of access to the same from the said street; and the evidence also shows that this road has been in use over said land in favor of the owner, and had been possessed by him for his own convenience for a period of some thirty years.

But no one can be said to have an easement in his own land. An easement is something impalpable, of which a seisin cannot be predicated. (*Washburn on Easements*, ch. 1, § 1, sub. 13, p. 10; *Washburn on Real Estate*, vol. 2, p. 26.)

By the unity of possession in Belknap of the entire land over which the road in question passed, no easement could be created by the owner's use of the road, as long as there was no severance or division of the land.

If a right of way be from close A to close B, and both closes be united in the same person, the right of way, as well as all other subordinate rights and easements, are extinguished by the unity of possession. (*Whalley agt. Thomson*, 1 Bos. & Pull. 371.)

A prescription even may be lost by unity of possession, of as high and perdurable an estate in the thing claimed, and in the land out of which it is claimed, by such prescription, because it is an interruption of the right. (1 *Inst.* 114 b.) As for example, when one entitled in fee to a right of way, or of common, becomes seized in fee of the land itself. (*Greenleaf Cruise on Real Property Title Prescription*, vol. 3, p. 428, note.)

But I am of the opinion that, on the ground of obvious necessity, the plaintiff is entitled to a right of way, as well over the land of Neilson, his grantor, as over the land of defendant Gilsey, which, joining on Neilson's land, faces the south line of Eighty-fourth street.

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Plaintiff has no means of access to or egress from his dwelling, except over the lands of third parties.

When defendant Gilsey became seized of his lots, the road in question was in actual use, as a way to and from Eighty-fourth street to the dwelling house in question, over the land to which he acquired title. This road was the only means of communication by carriage way from the plaintiff's dwelling to the public, open thoroughfares of the city, and had been so used for thirty years. It was a well defined and graveled way. This property is useless to the plaintiff as a dwelling, unless he has a way in the true sense, by means of horses and carriages, to the public streets; without such means of transit, he cannot provide himself with fuel and other things necessary for living. He is completely isolated and shut up.

This right of way by necessity may arise in favor of a parcel of land, when the same is surrounded by what *has been* the grantor's other land, or partly by this and partly by that of a stranger. (*New York Life Ins. and Trust Co. agt. Milner*, 1 Barb. Ch. R. 353, 366; *Collins agt. Prentice*, 15 Conn. 39.)

It is not confined simply to a right over other lands remaining in the grantor, but it extends to a right of way over the lands of others.

In *Buckly agt. Coles* (5 Taunt. 311) it was decided that if a person owned close A, and a passage of necessity to it over close B, and he purchased close B, and thereby united in himself the title to both closes, yet, if he afterwards sold close B to one person without any reservation, and then close A to another person, the purchaser of close A has a right of way over close B.

While it is without doubt that a right of way of necessity arises and can be enforced, if a man sells land to another which is wholly surrounded by his own land, I do not think that this right is limited merely to the remaining land of the grantor. It may be quite as important for the party to have

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a passage over the land of third parties, lying beyond the grantor's land, to get to a public highway.

But in this case, the lots of the defendant Gilsey came from Belknap, the owner of the plot, at the same sale in which title was acquired by Neilson to the property, a portion of which, and that out of which this right arises, he subsequently conveyed to plaintiff.

The necessity out of which this right grows is always *strict*, and the right should continue only as long as the necessity continues.

As soon as the plaintiff can have access to a public street directly from his own lands, the right should terminate. He cannot continue this means of using the land of Gilsey for an indefinite period of time; and it must of necessity be subservient to the right of Gilsey to build on his lots, so soon as the streets are open for him to improve them in that way.

The defendant Gilsey, in his answer, says he has offered to give a way to plaintiff over his land twelve feet wide, the same to pass over another portion of his lot.

This is an admission on the part of Gilsey that the claim of plaintiff is necessitous, and not unreasonable. The defendant may still do this; provided it is done in such a way as to enable the plaintiff by means of the new way to get to the public street.

The right of selecting a place over which the new way shall pass, if one be yielded, lies with the owner of the land over which it is to pass; provided, on request, he shall designate it in a reasonable manner; and he may do it so as to be least inconvenient to himself. (*Holmes agt. Seeley*, 19 *Wend.* 507.)

I am of the opinion that the closing up of the road in question would be such an injury to the plaintiff, and to the estate he has in the land, as to justify the continuance of the injunction issued in this action until the hearing of the cause.

It is a well settled rule of equity that, where an easement or servitude is annexed to a private estate, the due enjoy-

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ment of it will be protected by injunction against encroachment or invasion. (*Corning* agt. *Lowerre*, 6 *John. Ch. R.* 439; *Tallmadge* agt. *East River Bank*, 26 *N. Y.* 105; *Trustees of Watertown* agt. *Crane*, 4 *Paige*, 510, 514.)

In this case plaintiff claimed the easement in question. It was peaceably and without hindrance enjoyed by the owner of the dwelling at the time defendant bought his lots; and I think plaintiff has a claim to the equitable interposition of this court by injunction order, until his claim may be tried in this action. (*Bonaparte* agt. *Camden and Amboy R. R.* 1 *Baldw. Cir. C. R.* 231; *Wetmore* agt. *Story*, 22 *Barb.* 414; *New Haven R. R.* agt. *Pixby*, 19 *Barb.* 428.)

Section 7 of article 1 of the constitution of 1846 does not apply to this case. That section provides for the opening of *private roads*; but in the case before us the *way* is already opened and in use, and has been used for a great many years. Its necessity is immediate and urgent.

The motion to dissolve the injunction is therefore denied.

In regard to the alleged contempt for its violation, it is to be observed that defendant Kilpatrick was not served with the injunction order until the 11th day of October, and after the fence was erected, and that he refrained from working immediately he was served with the process.

Although there is some reason to believe that he attempted to avoid the service of the papers, I cannot find that he knew of the existence of the injunction before it was actually served on him.

I am of the opinion that the defendant Gilsey is responsible for the erection of the fence on his lands, after the service of the injunction on him. It appears that he had previously threatened to shut up the road, and there is reason to believe that he encouraged and aided in the making of the fence by Kilpatrick, and that Kilpatrick was acting with his knowledge, and to some extent, at least, under his directions, and that the construction of the fence was a carrying out of his previous threat. At any rate, *he had the power and it was*

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his duty to have prevented the erection of the fence on his land, after the service of the order on him.

The work was done under his eyes and with his approval. The maxim "*Qui potest et debet vetare et non vetat, jubet,*" applies to him. (*Neale agt. Osborne*, 15 How. Pr. R. 81; *People agt. Sturtevant*, 9 N. Y. R. 263, 278.)

The motion to show cause why defendant Gilsey should not be attached and the fence removed is granted. As to defendant Kilpatrick it is denied.

SUPREME COURT.

AUGUSTUS W. GREENLEAF and others agt. PETER R. MUMFORD and others.

An attachment cannot be levied and a lien acquired upon money of a debtor deposited in a bank by another in the name of the latter, to whom the bank has given credit therefor; although the deposit be made collusively with the debtor, and fraudulently as to his creditors.

Neither can an action be maintained by the sheriff, or by a judgment creditor, in aid of such attachment, or to declare or create a lien on the fund, when none was acquired by the attachment proceedings.

New York General Term, April, 1868.

Before BARNARD, P. J., INGRAHAM and SUTHERLAND, J. J.

The plaintiffs having obtained an attachment against the property of the defendant Mumford, which the sheriff attempted to execute, upon money deposited in the Nassau Bank, it was found that the money had been deposited in the name of the defendant Oakey, who had drawn checks against it to his own order, got them certified by the bank, and then left them unindorsed in his box in the bank. Both Oakey and the bank at first denied that the money was the property of Mumford, or subject to the attachment. To prevent Oakey from indorsing the checks and drawing the

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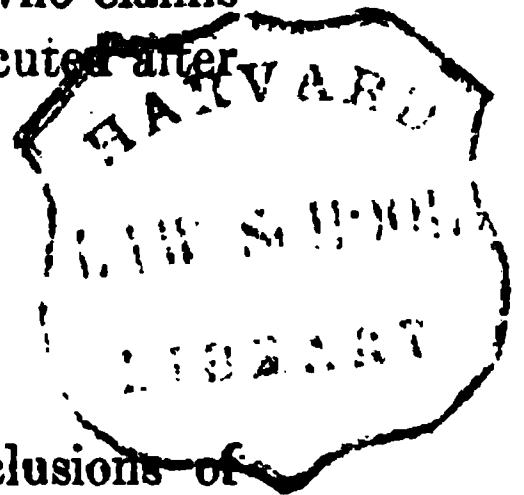
money, and the bank from paying it, and thus to remove the impediments to the levy under the attachment, this action was brought.

The court below held that the sum of \$53,000, so deposited by Oakey in the Nassau Bank, was really deposited for the use and benefit of Mumford, and belonged to Mumford; and that the drawing of the checks and getting them certified by Oakey, was a contrivance on the part of Mumford and Oakey to screen the money from the creditors of Mumford, and to prevent or defeat the levy of an attachment or execution thereon. The court also found that the levy was duly made, and that the plaintiffs were entitled to the satisfaction of their judgment out of the fund.

No one of defendants appeals except Speyers, who claims as assignee of Mumford, under an assignment executed after the levy.

CHARLES A. RAPALLO, *for defendant Speyers.*
D. D. FIELD, *for the plaintiffs.*

SUTHERLAND, J. The exceptions to the conclusions of law, that the service of the warrant of attachment on the Nassau Bank constituted a levy on the fund in question; that the money deposited by Oakey in the Nassau Bank was bound by the levy made under the attachment; and that the plaintiffs were entitled to the judgment specified in the fifth conclusion of law, were all well taken. These conclusions of law were all plainly erroneous, for the reason that they all assume that the sum of \$53,000, deposited by Oakey in the Nassau Bank, for which the bank had given him credit, and for which the bank had certified checks drawn by Oakey against the fund, was capable of being attached as a debt due or owing from or by the bank to the defendant Mumford. In other words, these conclusions of law and the judgment quietly assume against the defendant Speyers the main point in the case; and erroneously assume it; for the



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facts found show that there was no debt due or owing from the bank to Mumford on account of the \$53,000, or its deposit, when the attachment is alleged to have been served. The main question in this case is not as to the regularity or sufficiency of the service, or attempted service of the attachment; but the main question is, do the facts found show that there was any debt, fund, or thing which was or could be attached or levied on? Plainly they do not.

The transaction between Mumford and Oakey as to the \$53,000, however fraudulent and void as to the plaintiffs and other creditors of Mumford, was valid as between Mumford and Oakey; and whatever the right of the plaintiffs and other creditors, with judgments and executions returned *nulla bona*, to have the transaction declared fraudulent and void, and reach the fund in equity, the plaintiffs could not reach the fund with their attachment in their action against Mumford for their debt. The plaintiffs could only attach the fund as a debt of the bank to Mumford; but the facts found in this case show that the debt arising from the deposit in the bank by Oakey and the credit given by the bank to Oakey, was a debt of the bank's to Oakey, and not a debt of the bank's to Mumford. To say that the fund deposited in the bank by Oakey, and for which the bank had given him credit, and on account of which the bank had certified the checks of Oakey drawn against the same, could be reached by attachment in the action of the plaintiffs against Mumford for their debt; or to say that the fund was attached in that action, because the court below found in this action that the transaction between Mumford and Oakey was fraudulent and void, as to the plaintiffs and other creditors of Mumford; and that the fund so deposited by Oakey in equity belonged to the creditors of Mumford; is to say that you can give the finding and judgment in this action (commenced before the plaintiffs had got a judgment for their debt), on the question of fraud, an *ex post facto* operation, and that you can by this *ex post facto* operation support the attachment proceedings

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in the first action, and the lien and preference claimed by the plaintiffs to have been acquired under or by the attachment proceedings in the first action.

Why, the very claim of the counsel for the plaintiffs, that this action is an action to subject the fund in question to the attachment in the first action, involves the admission that it was not and could not be attached in the first action, and that the plaintiffs did not and could not, by the attachment proceedings in the first action, get any lien on the fund, and that they did not and could not, by their attachment proceedings in the first action, obtain any right or preference to have their debt paid in full out of the fund. And a claim that the fund was attached in the first action because the court below found, in this action, that the transaction between Mumford and Oakey was fraudulent and void as to Mumford's creditors, involves the same admission, that the fund was not attachable in the first action.

There is really no such thing as an action, either by the creditor or sheriff, to subject chattels or debts to an attachment issued under the Code. It is the Code which subjects property to attachment. Whoever heard, until recently, of an action either by a sheriff or creditor in aid of the Code, to subject property to attachment—to make that attachable under the Code which was not attachable under the Code.

In the case of *Kelly, sheriff agt. Lane and others*, I dismissed the complaint at special term, on the ground that the sheriff could not maintain such an action. There was an appeal, and it was reversed by the general term. For a more full discussion of the question, I refer to my dissenting opinion in that case at general term. (*See Kelly agt. Lane, 42 Barb. 610.*) I think I may say that the views expressed in my dissenting opinion in *Kelly agt. Lane*, were fully and unequivocally sustained by the court of appeals in *Lawrence agt. The Bank of the Republic* (35 N. Y. R. 320 S. C. 31 How. Pr. R. 502.) True, perhaps I did not say in *Kelly agt. Lane*, either at special or general term, that a creditor could not

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bring such an action, for I had no occasion to say it; but my reasoning applied equally to such an action by a creditor.

Judge MORGAN, in his opinion in the court of appeals, in *Lawrence agt. The Bank of the Republic (supra)*, does not say in words that a creditor could not maintain such an action; but as the questions in the case arose on the defendant's answer setting up the attachment proceedings by the defendant, the question whether either the defendant or the sheriff could have maintained such an action, was before the court. It does not appear that there had been a suggestion by counsel, if the sheriff could not have maintained such an action, that the defendant could. It was natural, therefore, that the judge should in words limit his opinion to the question which had been discussed, whether the sheriff could have maintained such an action. I venture to say that the learned judge and the counsel assumed if the sheriff could not have maintained such an action, the defendant could not.

I dismissed the complaint in *The Merchants' & Traders' Bank agt. Dakin and others*, at special term, on the ground (see 28 *How. Pr. R.* 510 and 511) that the plaintiff, as a judgment creditor, with an execution out and not returned, *nulla bona*, could not maintain the action, the bond and mortgage sought to be reached and applied to the payment of the judgment being choses in action, or equitable assets. There had been an attachment issued in the action in which the judgment was obtained, under which attachment it was claimed that the bond and mortgage had been attached as a debt due or owing from the defendant *Miller* to the defendant *Dakin*. I dismissed the complaint, irrespective of the question whether the attachment proceedings did or could aid the plaintiff in maintaining the action. I assumed that the attachment proceedings did not enable the plaintiff to maintain the action. There was an appeal; and it seems (see 33 *How. Pr. R.* 316) that the general term, instead of passing upon the point upon which the complaint was dismissed at special term, affirmed the judgment of dismissal

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on the ground, substantially, that though the sheriff might have maintained an action to subject the bond and mortgage to the attachment, notwithstanding their formal and alleged fraudulent assignment by Dakin to the defendant Jewell *before the attachment proceedings*, yet that the plaintiff, the creditor, could not.

Lawrence agt. The Bank of the Republic was decided by the court of appeals at the March term, 1866. *The Merchants' and Traders' Bank agt. Dakin and others*, was heard by the general term, at the January general term, 1867.

It is certainly singular that Justice LEONARD, who wrote the elaborate opinion of the general term in the last mentioned case, should be repeated as having concurred in Judge MORGAN's opinion in the court of appeals, in *Lawrence agt. The Bank of the Republic*.

If the moneys deposited by Oakey in the Nassau Bank were regularly and properly attached, in the action by plaintiffs to recover a judgment for their debt, either as the moneys of Mumford or as a debt of the bank's to him, there was no necessity or occasion for this action; and if they were not so attached in the first action, this action could not be maintained in aid of the attachment proceedings, or to declare or create a lien on the fund, when none was acquired by the attachment proceedings.

This action was commenced before the plaintiffs had obtained judgment in their action in which the attachment was issued, and after the assignment by Mumford to the defendant Speyers, for the benefit of all of Mumford's creditors, equally and without preferences.

The purpose of this action was to have the transfer of the \$53,000 by Mumford to Oakey, and the deposit of it by Oakey to his own credit in the Nassau Bank, judicially declared fraudulent and void as to the plaintiffs, as attachment creditors of Mumford; and to have it further judicially declared, that the moneys had been attached in the action in which the attachment had been issued as the moneys of

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Mumford, so that the plaintiffs might obtain the further judicial declaration, and a judgment, in this action, that they should be paid their debt in full out of these moneys, instead of taking their share under the assignment with other creditors, whose debts were equally meritorious with their own.

Now it appears to me, in view of the maxim, "that equality is equity," and in view of the circumstance that the very institution of this action must be regarded as a confession that the moneys had not been attached, it must have required great courage, or a great confusion of ideas, and a gross misapplication of analogies, to bring the action.

Upon what rests the power of the court below to find, as was found in this case, that the service of the attachment was a good and valid service, and that the money in question was bound by the levy under the attachment, and "that the same has been properly subjected to the execution issued on the judgment" entered in the attachment action? The attachment proceeding was a statutory proceeding under the Code, and regulated by the Code. Upon what rests the power of a court of equity to interfere with it, to declare moneys to have been attached which had not been attached; a levy to have been made and a lien acquired, when in fact there was neither a levy nor a lien; to declare that to have been done and that to have existed which was never done and never did exist; to declare a fiction to be a fact?

There are fictions of law, but the maxim is "*in fictione juris semper subsistit æquitas*."

"Equality is equity," and we are not called upon in this case to strain a point to initiate a principle, or to create a precedent, that the plaintiffs may be paid their debt in full at the expense of other creditors equally meritorious. My excuse for this rather elaborate opinion on a question which I deem so plain must rest on the cases which have been referred to, and on the fact that I am writing this opinion

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upon a reargument ordered in this case, after judgment of affirmance by the general term.

As the answer of the defendant Speyers, the assignee, asks for the affirmative relief and as the necessary parties appear to be before the court, and as there is not a doubt that the conclusion of the court below, that the transaction between Mumford and Oakey, and the deposit of the \$53,000 by Oakey in his own name, was fraudulent and void as to the plaintiffs and other creditors, I think we can and should declare and adjudge that the defendant Speyers, as assignee, was and is entitled to the whole fund in question, which it seems was deposited in the New York Life Insurance and Trust Company, by order of the court, to be distributed under and according to the assignment, and that it be paid over to him for such distribution, leaving him to take such action on or as to the bond, which was given for the repayment of so much of the fund, with interest, costs and damages, as was paid to the sheriff by order of the court, in satisfaction of the plaintiffs' execution, as he shall be advised to take; and I think that the judgment appealed from should be reversed, and the plaintiffs' complaint dismissed with costs.

SUPREME COURT.

JAMES H. BUCKLIN agt. HELEN M. CHAPIN, Administratrix, &c.

Reference of Claims against Executors and Administrators. On the 11th of May, 1866, the surrogate of Herkimer county made an order or writing in this case as follows:

"SURROGATE'S COURT, Herkimer County. In the matter of the claim of *James H. Bucklin agt. The Estate of Edmund G. Chapin*. The claim of James H. Bucklin having been presented to the administratrix and rejected, and the parties agreeing to a reference: It is ordered by the surrogate, that Hon. Amos H. Prescott, Martin W. Priest, Esq., and William T. Wheeler, Esq., and they are hereby appointed, referees to hear and determine the claim of said Bucklin; and let this order be entered with the clerk of Herkimer county.

"Dated, 11th May, 1866, at Herkimer.

VOLNEY OWEN, *Surrogate*.

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"We assent to the above order, and consent the same to be entered May 11th, 1866.

"HARDIN & BURROWS, *Attorneys for plaintiff.*

"H. LINK, *Attorney for administratrix.*

"Indorsed, Filed 11 May, 1866.

"Z. GREENE, *Clerk.*"

Held, 1st. That this order and consent taken together are an *agreement in writing to refer* required by the statute.

2d. That they constituted an *approval by the surrogate* of the persons agreed on as referees.

3d. That they were filed, and the fact of filing is noted on the paper, which answers the requirement that the *agreement and approval must be filed.*

4th. That the requirement of the statute, that the rule referring the claim to the persons indicated must be *entered by the clerk of the supreme court*, can be complied with by an entry by the clerk *nunc pro tunc*, if it was not actually entered at the time of filing.

Assuming, however, that the papers are not in conformity to the statute, the referees nevertheless acquired jurisdiction to hear, try and determine the matters in controversy between the parties, by the *voluntary appearance* of the parties, the supreme court having jurisdiction over such claims, which were submitted to the referees; and their report is legal and binding until set aside by the court in some proceeding properly instituted for that purpose.

There is no more necessity for an agreement in writing and rule of reference in the class of cases under the statute, like the present, than there is in references under the Code (§ 270); and under the latter it is well settled that proceedings upon a reference is a waiver of all objections because of irregularities.

The appearance before the referees, the trial of the claim presented and report thereon, are all that are necessary to justify the entry of a judgment. All the preliminary steps may be supplied *nunc pro tunc*.

Syracuse General Term, April, 1868.

Before FOSTER, MULLIN and MORGAN, Justices.

THE defendant is the administratrix of her husband, E. G. Chapin, deceased, having been appointed by the surrogate of Herkimer, in December, 1861.

The plaintiff, claiming to have a debt due to him from the intestate, presented an account to the agent of the defendant, on the 17th December, 1862, by which a balance was claimed to be due of \$715.59.

This account was not brought to the knowledge of the defendant until April, 1866, when she served notice on the plaintiff that it was rejected.

On the 11th May, 1866, a paper, of which the following is a copy, was drawn and signed by Volney Owen, surrogate of Herkimer county:

"SURROGATE COURT, *Herkimer County.* In the matter of

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the claim of *James H. Bucklin agt. The Estate of Edmund G. Chapin.*

"The claim of James H. Bucklin having been presented to the administratrix and rejected, and the parties agreeing to a reference: It is ordered by the surrogate, that Hon. Amos H. Prescott, Martin W. Priest, Esq., and William T. Wheeler, Esq., and they are hereby appointed, referees to hear and determine the claim of said Bucklin; and let this order be entered with the clerk of Herkimer county.

"Dated 11th May, 1866, at Herkimer.

"VOLNEY OWEN, *Surrogate.*

"We assent to the above order, and consent the same be entered May 11th, 1866.

"HARDIN & BURROWS, *Attorneys for plaintiff.*

"H. LINK, *Attorney for administratrix.*

"Indorsed, Filed 11 May, 1866.

"Z. GREENE, *Clerk.*"

The parties appeared before the referees above named, and they heard their proofs and allegations, and made a report, entitled in the supreme court and addressed to it, by which they found due to the plaintiff \$714.59, for which sum they ordered judgment.

The defendant appealed from this judgment to the general term; and when the appeal was brought on for argument, the court refused to hear it, and required the parties to move at the special term to confirm the report, and for judgment, and from the judgment, if there ordered, an appeal might be taken.

The plaintiff's counsel, instead of conforming to the direction thus given, moved at a special term held by Justice MORGAN, in Onondaga, in July last, to set aside the appeal; exceptions and notice of appeal taken and made by defendant, on the ground that there was no agreement in writing to refer the claim to the persons named as referees, nor any approval of such persons by the surrogate, by reason whereof

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the hearing and decision of the referees became and was an arbitration, and not a reference, under the statute.

The court granted the motion, and from the order granting it the defendant appeals.

FRANCIS KERNAN, *for defendant*.

GEORGE A. HARDIN, *for plaintiff*.

By the court, MULLIN, J. The Revised Statutes (3d vol. 5th ed. 175, § 41) provides, if an executor or administrator doubt the justice of any claim presented to him, he may enter into an agreement in writing with the claimant to refer the matter to one or three referees, to be approved by the surrogate; and upon filing such agreement and approval with the clerk of the supreme court, a rule shall be entered by the clerk, referring the matter to the persons so selected.

The next section clothes the referees with the same powers as if the reference was in action in the court in which order of reference is entered.

In order to confer jurisdiction on the court under this statute, it is not necessary there should be a literal compliance with its terms; a substantial compliance is enough.

To give jurisdiction, there must be:

1st. An agreement in writing to refer.

There is no formal agreement signed by the parties, but the order signed by the surrogate recites the presentation of the claim, and that the parties have agreed on a reference. The attorneys of the parties sign a writing at the foot of the order that they, the parties, consent to the order. Laying out of view the presumption that a formal agreement was preferred, I think the order and consent, taken together, are an agreement in writing to refer.

If the attorney for the administratrix had made an offer in writing to refer, and the attorney had signed and delivered to her a written acceptance of the offer, it would not be con-

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tended but that the two papers would constitute a valid agreement.

Suppose the surrogate had written, the parties have agreed to refer the claim in dispute to these men as referees, naming them, and the attorneys had written beneath it, "we hereby agree to the above reference," can it be doubted but that the two papers, taken together, would have been an agreement under the statute?

This is exactly what has been done. The paper written by the surrogate takes the form of an order, instead of a mere statement that the parties had agreed to refer.

2d. The persons agreed on as referees must be approved by the surrogate.

There can be no question but that the surrogate approved the men selected. No more conclusive evidence of approval could be given.

3d. The agreement and approval must be filed. They were filed, and the fact of filing is noted on the paper.

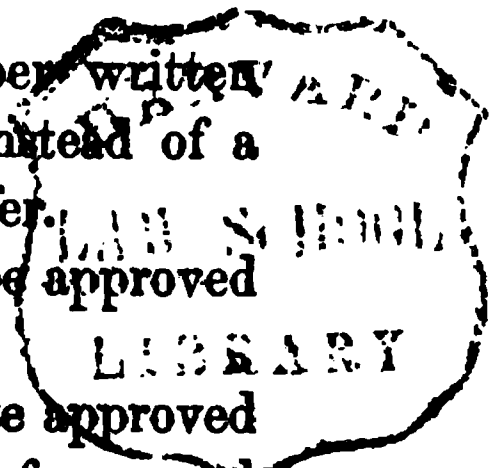
4th. A rule referring the claim to the persons indicated must be entered by the clerk of the supreme court.

The agreement takes the form of an order. It was filed with one of the clerks of the supreme court; and the order must be entered in that court, as there is no other court having jurisdiction to make the order.

Entitling the order in surrogate's court could not impair the regularity of the order. The county clerk was not the clerk of the surrogate's court; he could not enter it, therefore, in that court, and the entry could have effect only in the supreme court, whose clerk he was and in which court it could be regularly entered.

But assuming that it never was entered by the clerk, it can be done *nunc pro tunc*, and should be so entered to prevent a failure of jurisdiction.

But if it must be assumed that the papers are not in conformity to the statute, I am nevertheless satisfied that the referees acquired jurisdiction to hear, try and determine the



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matters in controversy between the parties, and that their report is legal and binding on the parties until it is set aside by the court in some proceeding properly instituted for that purpose.

The supreme court has jurisdiction over the claims which were submitted to the referees; in other words, it has jurisdiction of the subject matter. By the voluntary consent and appearance of the parties, jurisdiction of their persons was obtained; and when jurisdiction over both is acquired, the proceedings thereafter are valid, however irregular they may be.

Section 270 of the Code provides that all or any of the issues in an action may be referred upon the written consent of the parties. Under the old practice, the reference of the issues in an action not referable, or to a greater or less number than the statute prescribed, was a discontinuance of the action, and the reference became an arbitration merely.

It will be seen that a consent *in writing* is necessary to refer issues in all cases in which the court may not compel a reference, and hence a written consent is just as necessary to a valid reference under the Code, as to a valid reference under the statute relating to the reference of claims against executors and administrators.

It was held in *Leaycraft agt. Fowler* (17 How. Pr. R. 259) that the consent to refer under section 270 of the Code may be written by the parties, or their attorneys, or by the clerk entering their consent in his minutes, or by the referees in their minutes, consent being given thereto. And the parties might waive any entry other than that made by the referees on their minutes. In that case, after appearing before the two referees to whom the issues had been referred, a third was added, and the only entry was by the referees in their minutes.

The same was held in *Keator agt. Ulster Plank Road Co.* (7 How. Pr. R. 41). In that case there was no writing, the agreement to refer was in open court; and it was held the

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requirement of the statute as to consent in writing could be and was waived.

As to the power to waive the requirement, see *Baker* agt. *Bramen* (6 *Hill*, 47); *Lee* agt. *Tillotson* (24 *Wend.* 337); *People* agt. *Murry* (5 *Hill*, 468); *Embury* agt. *Conner* (3 *Coms.* 511).

In *Harris* agt. *Bradshaw* (18 *J. R.* 26) a rule of reference was entered by consent in an action of assumpsit, but the trial did not require the examination of a long account. The cause was tried, a report made and sued upon as an award. The court held the reference regular. The court say the consent of the parties to a reference concluded them from objecting that the action was not referable. It being assumpsit, it may have involved long accounts. The reference was an admission that the case was within the statute, and the court would not listen to an objection to the contrary.

Proceedings upon a reference, is a waiver of all objections because of irregularities. (*Garcie* agt. *Sheldon*, 3 *Barb.* 232). In *Bonner* agt. *McPhail* (31 *Barb.* 106) the action was slander for words spoken in reference to the evidence of a plaintiff in an action tried before a referee. No order of reference had been entered, and was not until some two months after trial, when one was entered *nunc pro tunc*.

It was held by the general term in the second district, that the referee had no power to administer oaths. But that the omission to obtain the order of reference before the referee proceeded to hear the cause, was an irregularity which the parties might waive or correct so as to give effect to the report.

In *Comstock* agt. *Olmstead* (6 *How. Pr. R.* 77) Judge GRIDLEY decided that when a claim was presented against an estate and rejected, and an agreement to refer entered into, but it was never filed nor rule entered, that the court did not come possessed of the cause, and he cites in support of the position *Robert* agt. *Ditmas* (7 *Wend.* 525) in which

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SAVAGE, Ch. J. says there must be an agreement in writing filed as the foundation of the rule to refer, there must be a report and the report must be confirmed. It will be seen, by reference to the opinion of the chief justice that he was not speaking, nor was he called to speak, as to whether compliance with each of these requirements was essential to give validity to the report. He spoke of them as he would of the service of process, joining issue and serving notice of trial as necessary to a judgment.

But while the general rule is that each step is necessary, yet it does not follow but that some of them may be waived.

I can perceive no more necessity for an agreement in writing and rule of reference in the class of cases under consideration than under section 270 of the Code, already referred to. If they may be dispensed with in the one case, so may they in the other.

The appearance before the referees, the trial of the claim presented and report thereon, are all that are necessary to justify the entry of a judgment. All the preliminary steps may be supplied *nunc pro tunc*. (1 *Wend.* 314.)

I think the order should be reversed and the appeal, &c., restored.

SUPREME COURT.

In the Matter of the Petition of JOHN W. LEWIS agt. THE MAYOR, &c., of the City of New York.

The provisions of the act of 1858, in reference to vacating assessments, &c., are only intended to relieve against fraud or legal irregularity in the proceedings relative to an assessment or the proceedings to collect the same.

The act does not authorize any inquiry, whether the work has been well done; or whether the contract has been fully performed; or whether the materials used are according to the specifications; or whether the common council had all the surveys and certificates of inspectors as required by the ordinances, except where fraud is alleged to have been committed.

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By the act of 1813, the common council of New York are authorized to *repair or repave* a street, and to charge the expense *upon the property*.

The *unanimous consent* required to the passage of an ordinance by both boards of the common council *on the same day*, is the consent of all the members present at the time of its passage. And this may appear from the fact that no objection was made at the time. and that all the members present voted for the ordinance.

It is not necessary to publish for two days an *amendment* to an original ordinance providing for the expense of repairing a street. A publication under the original ordinance gives notice to the owner of the contemplated improvement, and this satisfies the requirements of the statute.

An objection that no *appropriation* was made by law before the contract was made (*Laws 1857, ch. 446*) is answered by the fact that this provision does not apply to cases where the expense is charged upon the *owners* and not on the public treasury.

Objections to the mode of doing the work and the want of proof annexed to the assessment roll are not grounds for vacating such an assessment.

It is not a valid objection to such an assessment made by the board of assessors, that the *assessors had been changed* between the passage of the ordinance and the signing of the assessment roll. The statute directs the duty of assessing to be done by the *board of assessors* for the time being. It is unnecessary to name the assessors individually in the ordinance.

The assessors cannot include any charge for making the assessment. The allowance of 2 per cent for making such assessment is no longer a legal charge.

New York General Term, January, 1868.

Before BARNARD P. J., INGRAHAM and SUTHERLAND, Justices.

AN application was made to judge CLERKE to vacate the assessment in this case under the act of 1858. Testimony was taken before that justice and afterwards on a hearing before another justice the application was denied. The petitioner appeals from that order.

JOHN ELY, *for petitioner, appellant.*

RICHARD O'GORMAN, *counsel to the corporation. for respondents.*

I. The first objection taken was that the common council have no lawful authority to cause the expense of this repavement to be assessed upon the owners of the property benefited; because, by an ordinance enacted in 1824 by the common council, it was provided substantially, that when a street has once been paved to the satisfaction of the officers of the corporation, at the expense of the owners of the adjacent property, it shall forever thereafter be paved, repaired and repaved at the expense of the corporation. (*See p. 237 Revised Ord. edition of 1859.*) And that by act of legislature (*chap. 160 Laws 1837*) it is enacted that all ordinances of the common council shall continue in force until repealed.

The answer to this objection is twofold.

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1st. The act of 1813, section 175, empowers the corporation to make the improvement in question. The same statute authorizes the common council to lay an assessment for expenses incurred upon the property benefited.

It thus became the duty of the common council to raise the money to pay the expenses incurred, in the manner authorized by the act; nor could they by ordinance abrogate the duty which the statute imposed, to assess the expenses upon the property benefited.

Therefore the ordinance of 1824, which attempted to release that source of payment which alone is authorized by the law, was invalid, void *ab initio*; and having no legal existence, could not receive vitality and be kept in existence by the statute of 1837. (*Rhineland agt. The Mayor*, 24 How. 304.)

2d. Conceding that the ordinance had legal existence, the effect of the statute of 1837 is only to give it the force of law until repealed.

It is still subject to be repealed by the common council, and they have repealed it as to this improvement by enacting the subsequent and inconsistent ordinance, which commands the expense thereof to be assessed upon the owners of property benefited.

II. Another objection raised, *viz.*, that the contract for the work done was void and consequently no expense was legally incurred thereunder, because no appropriation was previously made covering the expense thereof, as required by section 28 of the charter, is sufficiently answered by quoting the language of SUTHERLAND, J. in an opinion delivered in February, 1867, *In the matter of James M. Brown*.

"That provision (of the charter) relates to expenditures of money out of the city treasury, and not to expenditures which are to be charged to and assessed upon the property of individuals.

"In such cases no expenditures were made out of the treasury, and no appropriations are necessary, because the cost of such improvements is paid by the owners of property adjoining, and not by the public authorities."

A moment's consideration shows the absolute impracticability of applying that provision to contracts which must be paid from assessments.

When the contract is made there is nothing to appropriate, for the assessment is not laid until the work is done; even the amount of the contract is unascertained until the work is done and the quantities ascertained by the surveyor's measurement.

III. Another objection raised is that the sum of \$792.80 (being 2 per cent) is charged for the expense of making the entire assessment of \$40,000 for the whole improvement, of which a portion is charged to petitioner.

(a.) The decision in *Beckman's case* (19 Abbott, 245) was not that it was improper to charge the expenses of assessing, but that the charges for assessing (about \$3500) in that case were proven to be excessive and beyond the expense actually incurred therefor. (*See Anderson's Points*, 19 Abbott, 247.)

In this case no such proof is offered and the court must presume the charges made to be correct in amount.

The case of *Wendell agt. Brooklyn* (29 Barb. 204) cited by appellant is not analogous. There the health officer of a city demanded extra compensation; here the assessors ask nothing—the corporation seeks to be reimbursed the amount expended in sustaining officials, whose exclusive duty consists in apportioning these assessments.

(b.) There is no proof in the record presented to the court that any expense was incurred under this amendment of the ordinance.

(c.) The case shows that the assessment upon petitioner amounted to \$1324; the amount assessed upon him, to which the attention of the court is confined in this

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proceeding, is therefore only \$26.48, an amount so insignificant that the court should discard the objection rather than inflict a great and almost remediless disaster upon the corporation by a decision which will vacate every assessment levied in this city since 1859. "*De minimis non curat lex.*"

IV. The next objection taken is that the ordinance of July 14, 1864, amending the ordinance of April 13, 1864 (which last named ordinance originated the improvement) was adopted by both boards of the common council on the same day in contravention of sections 7 and 37 of the charter.

(a.) In reply to the objection, so far as it is founded upon section 7 of the charter, it is sufficient to say, that the publication for two days therein required, applies only to resolutions, &c., which "recommend," i. e. originate an improvement involving the appropriation of public money, &c. That the amendatory resolution of July 14, 1864, did not originate the improvement; the improvement had been already initiated, and the necessity for assessing the citizens created by the resolution of May 13, 1864, and the amendatory resolution was merely regulating the method and manner of completing the work.

So far as any objection to the resolution is founded upon section 37 of the charter, such objection is completely refuted by the evidence in the case, which shows that the ordinance was adopted by unanimous consent, no one objecting, as appears on the record; all who were present and voted, voted in favor of the ordinance. It does not appear that any were present at the time of the vote who did not vote for it.

V. Another objection made is that the inspector's certificate and surveyor's affidavit, required by an ordinance of the common council, was not attached to the assessment roll.

To this objection I answer:

1st. Compliance with the ordinance is not essential to the validity of the assessment.

The statute has given the corporation power to do the work and lay the assessment; it can lay the assessment, make up the assessment roll in such form and shape as is most convenient; the ordinance enacted by the corporation, requiring these certificates to be attached to the assessment list, is merely to serve its convenience, and is no part or condition of the exercise of the powers conferred by the statute.

It is merely directory and non-essential. (*Vide Rock's case*, 12 Abbott, 119.)

2d. The testimony shows that the ordinance has been substantially complied with.

The inspector's certificates are introduced in evidence, duly made, at the proper time, and filed with the contract clerk, instead of being tied to the assessment roll.

The surveyor also testified that the amount of the work is correctly stated in the certificate attached to the list.

In what manner are the assessed persons aggrieved or injured by the filing of these papers with the clerk, instead of fastening them to the list?

3d. This objection is too late.

It is admitted by stipulation in the testimony that it was not taken before the assessors; if it had been, they could easily and at once have supplied the defect.

Such irregularity, if it is one, does not affect the jurisdiction, and is cured unless the objection is raised before judgment. (*Embury agt. Connor*, 3 Comstock, 511; *Miller's case*, 12 Abbott, 121.)

VI. The objections raised by appellant's points VIII, IX, X, XI, are the most trivial, in fact and in law, that the anxiety of property owners to cast upon the public the burden of improving their property has yet pressed upon the attention of the court.

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1st. The testimony shows as matter of fact that the friend and son of the applicant have discovered forty or fifty cobble stones that are from one to three inches larger than the specifications require.

In that tremendous fact consists the violation of the contract.

2d. Whatever the fact be, the objection is not available to the petitioner here.

To entitle the petitioner to relief under the act of 1858, fraud or irregularity "in the proceedings relative to the assessment" must be proven; but fraud in awarding the contract, or ascertaining or allowing the quality of work done under it, cannot be said to be relative to the assessment. (*Hays' case*, 14 *Abbott*, 53; *Matter of 80th street*, 31 *How.* 99.)

VII. The appellant's last point is, "That the individual assessors are not named in the ordinance commanding the assessments."

We reply :

1st. The record presented to the court contained no evidence that any person is named, or by any ordinance empowered, to lay the assessment.

The improvement having been directed by the corporation ordinance of April 13, 1865, the statute (*chap. 302 Laws 1859*) charges upon the board of assessors the duty of making the assessment required by law (*see Valentine's Laws*, p. 1280), and the court, in absence of evidence to the contrary, must presume that the assessment has been laid by the board of assessors.

VIII. The order of the justice at special term should be affirmed.

By the court, INGRAHAM, J. The provisions of the act of 1858, in most of the applications under it for relief, are not properly understood. They are only intended to relieve against fraud or legal irregularity in the proceedings relative to an assessment or the proceedings to collect the same. Keeping in view the object of the statute, it is apparent that it does not authorize any inquiry whether the work has been well done, or whether the contract has been fully performed, or whether the materials used are according to the specifications, or whether the common council had all the surveys and certificates of inspectors, as required by the ordinances.

These matters belong to the common council as the law was formerly and now is, the board of revision, and do not come within the provisions of this statute, except in cases where fraud is alleged to have been committed. This application is not founded on any allegations of fraud, but the petitioner seeks relief for the supposed legal irregularities in the proceedings.

The first objection is, that the common council have no authority to assess for repairing a street. The power to

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assess the expense for paving a street is admitted to exist under section 175 and 176 of act of 1813, p. 407. The subsequent authority to the common council to repair the streets and employ persons therefor in sections 193, 194 and 195, does not prevent the charging the expense thereof to the owner. Even if it did, it would not apply to this case of an entirely new pavement, after raising and altering the grade. Either repairing or repaving may be, under these sections, made a charge upon the property.

It is, however, urged that the ordinance of the corporation passed in 1824, by which it was agreed that the streets should be kept in repair at the public expense after they are once paved at the expense of the owner, prevents any such assessment.

In *Rhineland* agt. *The Mayor, &c.* (24 How. R. p. 304), this question was raised, and the justice expressed the opinion that the common council could not bind themselves not to assess for such repaving. That case has been, to some extent, reviewed, so far as it held that the common council could not impose part of the expense of paving a street on the public; and I cannot assent to the doctrine that the common council may not provide by ordinance for repairing and repaving streets at the public expense. I do not, however, consider it necessary to pass on that question here, because this does not come within the provisions of the act of 1858. It is not an irregularity in the proceedings in making the assessment, nor in collecting it. If the common council have made a contract with the owner which they now seek to violate, the remedy is not under this act.

That ordinance also applies only to streets paved after its passage, and there is no evidence to show when West street was originally paved. The objection to the ordinance of July, 15, 1864, is not valid; it was passed by both boards on the same day. That could not be done, unless by unanimous consent. The unanimous consent required, is the consent of all the members present at the time of its passage.

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This appears from the fact that no objection was made at the time, and that all the members present voted for the ordinance. Nor was it necessary to publish it for two days previous. That was necessary when the first ordinance was passed, but was not necessary for its amendment. The expense originated under the first ordinance, and a publication then gave notice to the owners of the contemplated improvement, it thus satisfied that requirement of the statute.

Another objection is, that no appropriation was made by law before the contract was made (*Laws of 1857, ch. 446.*) It is a sufficient answer to say that this provision does not apply to cases where the expense is charged upon the owners, and not on the public treasury. The authority to advance to the contractor is under another statute, and the amount so advanced is refunded to the city when collected from the owners.

The other objections to the mode of doing the work and the want of proof annexed to the assessment roll, are not grounds for vacating this assessment. The stipulation shows the inspector's certificates were in the croton aqueduct department.

The remaining objection is, that assessors named in the ordinance did not make the assessment. The assessors had been changed between the passage of the ordinance and the signing of the assessment roll. The statute session 1859, chapter 302, directs the duty of assessing to be done by the board of assessors for the time being. The ordinance should have directed the assessment to be made by the board, and it was unnecessary to name them individually.

The assessment appears to have been made by the board, and there is in this respect no irregularity of which the petitioner can complain.

The assessors should not have included any charge for making the assessment. The allowance of two per cent for making the assessment is no longer a legal charge.

I have heretofore expressed this opinion that, as the amount

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was very small, I did not consider it advisable to vacate an assessment in all other respects valid.

The board should not include such a charge; and if persisted in, the court will feel bound to grant relief from it in cases which shall hereafter be brought before it.

The order appealed from is affirmed.

N. Y. SUPERIOR COURT.

WILLIAM H. MASTERSON and others agt. ARTHUR SHORT and eleven others.

The common council of the city of New York have power to create, by ordinance, public *hackney coach stands*.

Such ordinance, however, is no defense to an action brought to restrain an improper use thereof, by blocking up a street, creating a private nuisance, so that a person is prevented from having free access to and from his property. (*See decision S. C. 33 How. Pr. R. 481.*)

Special Term, January, 1868.

PLAINTIFFS, as co-partners, brought suit against the defendants to perpetually restrain them from standing their horses and coaches in front of the plaintiffs' premises, at the north-west corner of the Seventh avenue and Fifty-ninth street. The plaintiffs are the lessees of and carry on the livery stable business on said premises. The defendants carry on the same business with their hacks, and stand them on a line on the Seventh avenue from Fifty-eighth to Fifty-ninth street, so that there remained no opening for the plaintiffs to drive their horses into and out of their premises. These acts the plaintiffs claimed to be a *private nuisance*. The defendants justify under an ordinance of the common council, making that block a *public hackney coach stand*.

At the commencement of the action, a motion for a preliminary injunction was made, and denied by Judge JONES. (*See 33 How. Pr. R. 481.*)

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The case was tried on its merits before Judge BARBOUR, without a jury, and he ordered judgment for the plaintiffs, perpetually enjoining them, as prayed for in the complaint.

ALEX. H. REAVEY, *for plaintiffs.*

I. That the plaintiffs can maintain this action: see *People* agt. *Cunningham*, 1 *Denio*, 524; *Wetmore* agt. *Story*, 22 *Barb.* 414; *Gilbert* agt. *Mickle*, 4 *Sandf. Ch.* 357; *Milhau* agt. *Sharp*, 28 *Barb.* 228.

II. That the acts of which the plaintiffs complain constitute a nuisance, and which a court of equity will enjoin. (See *People* agt. *Cunningham*, 1 *Denio*, 524; *Wetmore* agt. *Story*, 22 *Barb.* 414; *Gilbert* agt. *Mickle*, 4 *Sandf. Ch.* 357.)

What is a nuisance? It is "anything that worketh hurt, inconvenience, a damage" (3 *Black. Com.* 215; 2 *Bishop on Crimes*, § 848); and that it is equivalent to torts (3 *Stark. Ev.* 979; 2 *Green. Ev.* § 465).

That an obstruction in the highway, similar to that of which the plaintiffs complain, is a nuisance. (See *Greasley* agt. *Codling*, 2 *Bing.* 263; *Cole* agt. *Sproul*, 35 *Maine*, 161; *People* agt. *Cunningham*, 1 *Denio*, 524.)

III. That this is a case in which an injunction should issue, see *People* agt. *Cunningham*, 1 *Denio*, 524, which is directly in point.

IV. As to whether this action can be maintained against the defendants?

(a.) If the defendants repeatedly committed the same wrong, though at different times and not collectively or jointly, an injunction can issue against all to restrain in futuro.

(b.) Even if but one of the defendants commit the wrong, and the others participate therein and claim a common right so to do, they have of course an interest, and are properly made parties.

(c.) A judgment can be rendered against some of the defendants and in favor of others. (See 2 *Hilliard on Torts*, p. 462, 464; 1 *Chitty on Pleadings*, p. 86.)

(d.) The defendants claim they have a right to stand their coaches where complained of, and have a several and joint interest in the result of this case, and are properly made parties under the Code. (1 *Daniels' Ch. Pr.* 306.) And in the same book, at page 200 (marginal 338), the rule is laid down that, if an interest is to be defeated or diminished by the plaintiffs' claim, all persons having any interest in the subject matter are proper parties to the action.

V. It is not necessary to aver or prove a combination on the part of the defendants; it is sufficient if they all unite in doing the same thing.

1st. The complainant charges that the defendants willfully and wickedly did the acts complained of.

2d. The evidence established that the defendants systematically and persistently stood their coaches, and claimed the right to do so.

The averment in the pleading and the proofs are consistent, and establish a concert or unity of action on the part of the defendants.

Webster thus defines the word wickedly: "In a manner or with motives and designs contrary to the divine law; viciously; corruptly." And he defines willfully as "by design; with set purposes."

From this, it is clear that we charge all the defendants with set purposes, viciously doing the acts charged; and it is claimed that it was not necessary to use the word "combined" to make the defendants jointly liable.

The facts required by the Code to be stated in pleadings are such facts as were

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required to be stated in pleadings at the common law; that is, *issuable facts*, facts essential to the cause of action or defense, and not those facts and circumstances which merely go to establish such essential facts. (*Knowles agt. Gee*, 8 Barb. 300.)

The provision of the Code, declaring that when parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole, applies *indiscriminately*, to all actions, whether they involve questions of common interest or not. (*McKenzie agt. L'Amoreaux*, 11 Barb. 516.)

In actions of tort, one of two defendants pleading separately may be acquitted, when the jury cannot agree respecting the other. (*Thatcher agt. Jones*, 31 Maine, 528.)

The Code allows a *several* judgment to be entered whenever a several suit might have been brought. (*Parker agt. Jackson*, 16 Barb. 33.)

Where a separate action against one or several of a greater number of defendants might have been maintained, a *several* or *separate* judgment is proper. (*Harrington agt. Higham*, 15 Barb. 524.)

Where defendants, in an action of trespass, *plead severally*, and plaintiff takes issue on the pleas of two of them, goes to trial and obtains judgment against them, without replying to the plea or disposing of the other defendants on the record, the judgment is not on that account reversible. (*Criner agt. Brewer*, 13 Ark. 225.)

In actions *ex delicto*, judgment may be rendered against one defendant, though others be acquitted. (*Horris agt. Preston*, 5 Eng. 201.)

In an action of tort, a recovery may be had against a part of the defendants. (*Milne agt. Huber*, 3 McLean, 212.)

Where, in trespass against several, there was a general verdict against all, it was held competent for the jury, on being called back after leaving the court room, to correct the verdict by finding against part only. (*Prussel agt. Knowles*, 4 How. Miss. 90.)

One of the great principles upon which courts of equity generally require all parties, who are known and within reach of its jurisdiction, to be made parties, is to prevent future litigation and take away multiplicity of suits. (*Mandeville agt. Riggs*, 2 Peters, 482.)

Several persons may be joined as defendants in a suit, though claiming distinct rights, if they have a common interest centering in the point in issue in the cause. (*Fellows agt. Fellows*, 4 Cow. 682.)

Two or more persons, having *separate* and *distinct* tenements which are injured or rendered uninhabitable by a common nuisance, or which are rendered less valuable by a private nuisance, which is a common injury to the tenements of both, may join in a suit to restrain such nuisance. (*Murray agt. Hay*, 1 Barb. Ch. 59.)

Where A. erected a nuisance and leased the premises to B, who sub-let to C, and he sub-let to D, all should be made parties to a bill to restrain the nuisance. (*Brady agt. Weeks*, 3 Barb. 157.)

All persons interested in the subject matter of the litigation should be made parties to a bill in equity. (*Neely agt. Anderson*, 2 Strobb. Eq. 262.)

The principle of equity, in respect to parties, is, that all persons interested in the subject of a suit ought to be before the court, so as to be concluded by the adjudication, and to avoid the vexation and expense of further litigation of the same matter by a party in interest who has been omitted. (*Van Horn agt. Duckworth*, 7 Ired. Eq. 261.)

An action on the case in the nature of a conspiracy will lie against one; or, if brought against many, all may be acquitted but one. (*Eason agt. Westbrook*, 2 Murph. 329.)

So it has been held indictable for a party to exhibit at the windows of his shop, in

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a public street, effigies, and thereby attract a crowd to look at them, which causes the footway to be obstructed, so that the public cannot pass as they ought to do; and that it is not at all essential that the effigies should be libelous, for the gravamen of the charge is the causing the footway to be obstructed; and it seems to be immaterial whether the crowd consisted of idle, disorderly and dissolute persons or not. (*Rex agt. Carlisle*, 6 Car. & Pa. 636; 3 *Graham & Waterman on New Trials*, 1293.)

In an indictment for a conspiracy, it is not necessary to use the words "conspire, combine, confederate or agree together." (1 *Gabbett Crim. Law*, 253; 1 *Deacon Crim. Law*, 209.)

Several may be joined, though they have acted separately, if the grievance, *e. g.*, the nuisance, is the result of all their acts. (*Rex agt. Stafford and others*, 1 B. & Ald. 871.)

Sergeant Talfourd says this is the more usual and convenient course, though a distinct indictment might, in point of law, be maintained against each. (*Rex agt. Atkinson et al. Ld. Raymond*, 1248; *Salk.* 32; *Corn agt. Harley*, 7 Met. 462.)

IRA SHAFER, JAMES H. COLEMAN and J. C. SHAW, for all the defendants.

BARBOUR, J. This action is brought to restrain the defendants from using the street and avenue in front of the plaintiffs' livery stable as a stand for their hackney coaches, and for damages. The defendants justify under a license of the corporation of New York, setting apart and designating the portion of the street and avenue in question as a hackney coach stand.

The evidence shows that the defendants, and also the plaintiffs, stand their carriages, while waiting for fares, along the entire front of the stables of the latter, and that, as one carriage is withdrawn, the others move up and fill the space, so that there is always a continuous line of carriages in front of the plaintiffs' passage way for vehicles into and from their stables. The injury caused to the latter by this seems to be quite small, but not sufficiently so, I think, to fall within the maxim "*de minimis non curat lex.*" Indeed, the only injury sustained by the plaintiffs for which they can have a remedy in this action is that which is caused by the detention of their coaches when about to leave or enter their premises, long enough to permit an opening to be made in the line by the withdrawal of one or more of the carriages, which has always been done upon their request.

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Undoubtedly, the corporate authorities of the city of New York have power under the charter (if, indeed, it can be said, after the recent decisions of our highest court, that a charter is still in existence) to license hackney coaches, and designate such portions of the streets of the city for the standing places thereof as they see fit. But they are bound to exercise that power with reasonable discretion. No ordinance of the corporation can lawfully authorize the creation of a private nuisance, and it follows that no such ordinance will justify him who creates one.

The continual blocking up of the only doorway of the plaintiffs' stables is certainly a nuisance, "a thing that worketh hurt" to them; and it is none the less so by reason of the letter of the ordinance which confers upon the owners of public hacks the right thus to use that portion of the streets.

The plaintiffs must have judgment perpetually restraining the defendants from obstructing the passage way in question, with costs.

As I am unable to determine from the evidence what amount of pecuniary damage has been sustained by the plaintiffs, I can make no direction as to that, except to say that, if they desire it, they may take a reference to ascertain what damages they have sustained by the obstruction to their passage way.

The decree will be settled before me, if necessary, on two days' notice.

COURT OF APPEALS.

THE PEOPLE OF THE STATE OF NEW YORK, respondents agt.
JAMES M. RAYMOND, appellant.

The office of *commissioner of taxes* in the city of New York, as at present constituted, comprises the official duties and functions of officers existing at the time the con

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stitution of 1846 was adopted, which were then performed by ward assessors and the board of assessors of the city.

The act of the legislature of 1867, vesting the appointment of these tax commissioners in the governor and senate, is *unconstitutional and void*.

These commissioners of taxes are *city officers*, and must be elected or appointed in the mode the constitution provides, to wit: "By the electors of such city or of some division thereof, or appointed by such authorities thereof as the legislature shall designate for that purpose."

January Term, 1868.

THIS is an action in the nature of a *quo warranto*, brought against James M. Raymond, a commissioner of taxes and assessments in the city of New York, an office to which he was appointed by the governor of the state of New York, by and with the advice and consent of the senate, under and in pursuance of the provisions of an act of the legislature of the state of New York, passed April 17, 1867 (*ch. 410 Laws of 1867*). The only question presented for the consideration of the court is the constitutionality of the act referred to.

The judge at special term, in New York, decided that the act referred to was valid, and affirmed the right of the defendant to the office.

This judgment was reversed at the general term and a new trial ordered.

The opinion of the general term is as follows:

New York January Term, 1868.

By the court, LEONARD, P. J. The new duties directed to be performed by the tax commissioners under the act of 1850, and since that time by the act of 1857 and other acts, are merely incidents and colorable additions to the duties

* NOTE. It is understood that the last legislature (1868) passed an act vesting the appointing power of these commissions in the *comptroller* of the city of New York. This act has not been made public as yet; but if its provisions are the same as those contained in a similar act passed by the legislature in 1859, authorizing the comptroller to appoint the commissioners, such an act will be required at every succeeding appointment by the comptroller, under the decision of this court in *People ex rel. Brown agt. Woodruff* 32 N. Y. R. 355; S. C. 29 How. Pr. R. 203; which held that the power of appointment by the comptroller became exhausted after the first exercise of it.—REP.

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before these dates for a long time appertaining to the office of assessors of taxes.

From 1850, when the board of tax commissioners was created, until the act of April 17, 1867, the commissioners were appointed by the board of supervisors or by the comptroller of the city of New York, local authorities elected by the people of that city. The change in the appointing power from the supervisors to the comptroller made no infraction of the constitution, because those officers are elected by the people of the city within which the commissioners are to perform their duties. By the act of 1867, the commissioners of taxes and assessments are to be appointed by the governor, an officer elected by the people of the whole state of New York. It requires no argument to demonstrate that the latter act is in plain violation of the spirit and intent of section 2, article 10, of the constitution of this state. The change in the name, with the continuation of the same powers and the addition of certain new duties and functions not before found necessary to the administration of the office, does not amount to a creation of a new office. Every office now filled by the people of the city of New York may, by legislation, have some new power or duty conferred, which, with the same reason and justice, it might be claimed, permitted a change in the term and power of appointment, so that the governor of the state, instead of the people of the city of New York, or some authority elected by them, should fill all the offices of that city. The plaintiffs are entitled to judgment of ouster, &c., against the defendant, and the judgment appealed from must be reversed with costs to the appellants.

From this order the present appeal is taken.

M. B. CHAMPLIN, *attorney general*, and HENRY H. ANDERSON, *for respondents*.

W. F. ALLEN, WALDO HUTCHINS and JOHN H. REYNOLDS, *for appellant*.

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GROVER, J. This is an action in the nature of a *quo warranto*, brought by the attorney general, to determine the title of the appellant to the office of commissioner of taxes and assessments of the city and county of New York. The appellant was duly appointed to such office by the governor, with the consent of the senate, pursuant to section 1, chapter 410, *Laws of 1867* (p. 981), and has duly qualified according to the requirements of said act. His right to the office, therefore, depends upon the constitutionality of said act. It is claimed by the counsel of the respondents that the act in question is in conflict with section 2, article 10, of the constitution, and, therefore, void. That section provides that all county officers whose election or appointment is not provided for by this constitution shall be elected by the electors of the respective counties, or appointed by the boards of supervisors, or other county authorities, as the legislature shall direct. All city, town, and village officers whose election or appointment is not provided for by this constitution shall be elected by the electors of such cities, towns and villages, or of some division thereof, or appointed by such authorities thereof as the legislature shall designate for that purpose. All other officers whose election or appointment is not provided for by this constitution, and all officers whose offices may hereafter be created by law, shall be elected by the people, or appointed, as the legislature may direct. There is no question but that the office in question is exclusively a city office. To determine whether the act in question is constitutional so far as the power of appointment is thereby vested in the governor, with the consent of the senate, it is necessary to determine whether the office in substance existed at the time of the adoption of the present constitution; and if found not so existing, then the further question whether city, town and county offices subsequently created may be filled in any mode prescribed by the legislature. To determine the first question, it is necessary to ascertain the functions and duties of the office in question. Thus, upon examination of the

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act in question (the act of 1859, page 678. the acts of 1857 and 1850), and the previous legislation, these will be found to consist of power to appoint deputies, clerks, &c., who, together with the officers in question, by performing the various duties of their respective offices, are to make an assessment of all the property liable to taxation in the city for municipal and state purposes. To correct the rolls of such assessments, and to equalize the same, and to preserve such rolls in an office to be kept by them, and deliver the same to those whose duty it is to levy the taxes upon such rolls, authorized upon the property of the city. It is necessary, also, to inquire whether the like functions were performed by any officers prior to the existing constitution. This all know must have been so, as taxation upon property is not wholly of modern origin, but has existed at intervals for state purposes, and at all times for municipal purposes, since the existence of the state, and there must necessarily have been at all times some mode by which a valuation of the property liable to taxation was made by public authority, as a basis upon which taxes were apportioned among its owners. An examination of the statutes in force at the adoption of the constitution, will show that such valuation was then made by assessors chosen by the electors of the respective wards of the city, two in each ward. That these ward assessors were required to assess all the taxable property in their respective wards; and when this was completed, they were all required to meet together as a board, and when so met, to compare, equalize, and correct all the assessment rolls of the city; and when completed, the assessors were to deliver the same to those whose duty it was to apportion the taxes required to be collected upon the basis of such valuation.

Thus it appears that precisely the same essential functions were performed in making, equalizing, correcting and delivering the assessment rolls by the ward assessors, at the time of the adoption of the constitution, that were contemplated

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to be performed by the commissioners of taxes and assessments by the act in question; that, although the names of the officers and their mode of appointment have been changed, the result to be accomplished by the one is identical with that of the other. But it is argued on the part of the appellant, that additional powers have been conferred and additional duties imposed upon the commissioners. This is true; they are to keep an office during the entire year, in which the rolls are to be kept for inspection; they are to procure and preserve maps of the lots in the city; to keep a record of the building permits; to them power is given to insert in the rolls property which has been omitted, and to do some other acts, none of which were required of the assessors, and which they were not authorized to do. But an examination of these new duties and powers will show that they are all such as are calculated to facilitate and the better enable them to perform the same essential duty performed by the assessors—that is, of perfecting a valuation of the property as a basis of taxation. Such additional facilities in the performance of the same duties, surely cannot make them new officers in the sense of the constitution.

If they can thus be made new, the section of the constitution above quoted may readily be made a mere nullity. I am far from conceding that it would be competent for the legislature to take from the city all control over the assessment of the property of the city for purposes of taxation and vest this power in the central authority, by conferring powers upon the officers or boards, upon which they conferred it over other subjects, and imposing duties upon them entirely foreign to those of making the assessment. The plain intention of the section of the constitution in question, was to preserve to localities the control of the official functions of which they were then possessed; and this control was carefully preserved consistent with the power of the legislature to make needful changes by restricting the power of appointment of other officers to perform the same functions

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to the people, or some authority of the locality. Any other construction would render the section in question, when applied to the cities of the state, substantially nugatory. It is not enough that the name of the officer is changed or the powers enlarged, to authorize the legislature to confer upon the governor the appointment of officers to discharge the duties performed by city officers at the adoption of the constitution.

This accords with the reasoning of the prevailing opinion in *The People* agt. *Draper* (15 N. Y. R. 532), and also with that of other cases, although the precise point has never been decided by this court. It is insisted that the assessors elected by the wards of the city were not city officers. It will be seen, by the act of 1830, that they not only assessed the property of their respective wards, but all were required to meet as a board and act upon and perfect all the rolls of the city. This clearly made them city officers within the meaning of the constitution. The acts of 1859, 1857 and 1850, gave the power of appointment of the commissioners to some local authority of the city, and thus preserved the local control over the subject. The act of 1867 vests the appointment in the governor and the senate, and thus deprives the city of all local control of the assessment of the property of the people for the purposes of taxation. It thus deprives the people of the city of a right secured to them by the constitution, and is therefore void. This renders a discussion of the question—whether the legislature can provide for the appointment to a city office, created after the adoption of the constitution, in any mode deemed best for the public interest—unnecessary, for the reason that the office in question was not so created within the meaning of the constitution. I will simply remark that this question was decided in *The People* agt. *Pinckney et al.* (32 N. Y. R. 377) in which it was held that this power was possessed by the legislature. The question was not at all discussed, but it was assumed that it had been decided in the same way in *The*

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People agt. *Draper* (*supra*). A slight examination will show that there was no such question decided in the latter case. It was there held that the officers in question were not city officers in any constitutional sense, but officers of the district created by the act; consequently, this question was not at all in the case; and all that was said in relation to it was entirely *obiter*. Whether the question, under the circumstances, would be considered open in this court, cannot now be determined.

The judgment appealed from must be affirmed.

The court held, in this case, that the office of commissioner of taxes, as at present constituted, comprises the official duties and functions of officers existing at the time the constitution was adopted; and that the act of the legislature, vesting their appointment in the governor, with the advice and consent of the senate, is unconstitutional.



SUPREME COURT.

ADDISON W. SEYMOUR, respondent agt. ULYSSES H. COOK,
appellant.

Liability of Innkeeper.—A guest, with his team of two horses and wagon, stopped at a village tavern, and after having had his horses put in the barn and fed, and having himself taken dinner, and paid his bill for the whole, requested the innkeeper to get his horses; the latter told him to go on and be hitching up, and he (the innkeeper) would be out in a few minutes; the guest went to the barn, put the head stalls on the horses, and was getting them out; and while doing so the innkeeper arrived there; but before the innkeeper arrived at the barn two men rode up in a buggy, unhitched their stallion horse and placed him in a stall between those occupied by the guest's horses and the outer door.

The guest led one of his horses out of the door for the purpose of hitching on to the wagon; and the other horse followed on, as he was accustomed to do, and when passing the stall where the stallion stood, received a kick from him which broke its leg and rendered it entirely worthless, so that it became necessary to kill it:

Held, that the innkeeper was liable. The relation of landlord and guest had not terminated; the horses were still on his premises and in his barn; the guest was only doing for the innkeeper, and with his assent, what it was his duty to have done.

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Syracuse General Term, January, 1868.

Before MORGAN, BACON and FOSTER, Justices.

APPEAL from a judgment in favor of the plaintiff, upon a verdict at the Onondaga circuit, held before the Hon. L. R. MORGAN, Justice, in June, 1867.

The action was brought against the defendant as an innkeeper, to recover the value of a horse which was injured while in his stable. The jury returned a verdict for the plaintiff for \$140, being its value, as proved; upon which judgment was rendered, and the defendant appealed to this court. The material facts are stated in the opinion.

JOHN MOLLOY, for appellant.

I. The relation of innkeeper and guest had terminated before the injury was done. (*Ingalsbee agt. Wood, 33 N. Y. 577.*)

(a.) The servant had paid his bill and had taken possession of the team.

(b.) He did not recognize the right of the defendant to interfere with or control the team. He declined to accede to the defendant's request that he should wait until the cause of the danger could be removed.

II. Though the liability of the innkeeper with respect to a guest is that of an insurer, yet, if the guest himself takes the responsibility of caring for and controlling the property, and declines to accede to the reasonable request of the landlord with respect to its protection, he can no longer claim that the innkeeper is an insurer, and he must bear his own loss, it being the result of his own negligence. (*Wilson agt. Halpin, 30 How. Pr. R. 124; Saunders agt. Spencer, Dyer, 266, b; Coyles' Case, 8 Coke, 33, a; Burgess agt. Clement, 4 M. & S. 306; Richmond agt. Smith, 8 Barn. & Cress. 9; Van Wyck agt. Howard, 12 How. Pr. R. 151; Hulett agt. Smith, 33 N. Y. R. 571.*)

The request to charge, at folio 86 of the case, was intended to and substantially does present the question as to whether the defendant, under the circumstances of this case, was an insurer.

III. The defendant can in no case be charged in damage, if the loss happen through the neglect of the guest, or from his refusal to obey the directions of the innkeeper. (*Hulett agt. Swift, 33 N. Y. R. 571; Purvis agt. Coleman, 21 N. Y. R. 111, 117, and cases cited.*)

It is not necessary that the plaintiff should have been guilty of gross negligence. It is sufficient that he did not wait when apprised of the danger.

It is impossible to conceal the fact that the defendant in this case was greatly and unjustly prejudiced by the charge of the judge to the jury; and upon the whole case, the defendant ought to have a new trial.

FULLER & BARTLETT, for respondent.

By the court, FOSTER, J. It appeared from the evidence

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that the horse in question was owned by the plaintiff. That on the 31st of October, 1866, the brother of the plaintiff, and who was in his employ, drove his team, of which this animal was one, to the village of Geddes, and stopped at the tavern kept by the defendant. He had his horses put into the stable and fed, and had his own dinner; for all which he paid the defendant. When he was ready to leave, he asked the defendant to get the horses, who told him to go on and be hitching up, and that he would be out in a few minutes. He went to the barn, put the head stalls on the horses, and was getting them out, and while doing so the defendant arrived there. Before the defendant reached the barn, two men, named McGee and McKay, rode up in a buggy, unhitched their horse, which was a stallion, and placed him in a stall between those occupied by the plaintiff's horses and the outer door.

The driver of the plaintiff's team led one of his horses out of the door, for the purpose of hitching on to the wagon; and the other, being the one in question, followed on, as it was accustomed to do, and, when passing the stall where the stallion stood, received a kick from him which broke its leg and rendered it entirely worthless, so that it became necessary to kill it.

The defendant did not deny that he received the horses into his stable in his character of an innkeeper; but it is insisted in his behalf that, before the injury happened, the servant of the plaintiff had taken the horses into his own possession and charge, and that the relation of landlord and guest had terminated.

Upon this question, there is no evidence to contradict what is hereinbefore stated, though the testimony of the defendant to some extent differs from that of the driver's; but his own statement is that he started twice to go with the driver to get the horses, but was interrupted; that the driver then said, "I can get my own horses, as you are busy;" to which

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the defendant replied, "I will be there as soon as I can get there;" and that he did arrive before the injury happened.

There is nothing in this to show that the liability of the defendant as an innkeeper was at an end. The horses were still on his premises and in his barn. The driver was only doing for the landlord, and with his assent, what it was his duty to have done. And unless there was some improper conduct on the part of the driver, which caused injury, the defendant is liable to the same extent as though he, instead of the driver, had been handling them at the time.

It is also claimed that the injury was caused by the negligence of the driver, in not keeping the horse away from the stall in which the stallion was placed; and the evidence of one of the witnesses, who came there with him and placed him in the stall, was that the driver was notified that it was a stallion, and that he should be careful.

It is not necessary to detail the evidence on this point; it is enough to say that to some extent there was a conflict in the testimony; and in my opinion the jury were warranted in finding as they did.

The negligence consisted in putting a stallion into an open stall, in a tavern barn, near the outer door, so that those passing in or out were obliged to pass near him.

The charge of the judge, to which there was no exception, fairly and properly presented all the questions in the case to the jury.

Exception was taken on the trial to the refusal of the judge to charge upon two propositions submitted by the defendant's counsel; but no point has been made upon them before me; and besides, they were embraced in the charge which had been made, and the refusal to charge as requested was placed upon that ground.

There was no error, in my opinion, either in the charge of the court or in the verdict of the jury.

The judgment should be affirmed.

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N. Y. SUPERIOR COURT.

N. MENDAL SHAFER, respondent agt. JAMES W. GUEST,
appellant.

The statute of April, 1860 (*Sess. Laws 1860, ch. 446, p. 771*) only gives the keeper of a *boarding house* a *lien* upon and right to detain the baggage and effects of a boarder for the amount which may be *due by him*, to the same extent and in the same manner as inkeepers have them.

Thus limiting the lien to that for board *actually due*, and not including board to become due under an *agreement to board in future*.

Nor can the act be extended to *any other indebtedness*, nor to any demand not due at the time of the detention.

Where on the trial the defendant makes no request to submit a certain question of fact, upon which there is some evidence, to the jury; or to take objection to the insufficient proof of demand of personal property before suit brought, he cannot avail himself of such omissions upon appeal to the general term.

General Term, November, 1858.

Before ROBERTSON, *Chief Justice*, MONELL and GARVIN,
J. J.

G. W. LORD, *for defendant, appellant.*

This action was brought to recover the possession of certain articles of household furniture, alleged to be wrongfully detained by the defendant.

The answer sets up two defenses:

First. That the defendant, at the time of the commencement of the action, had a lien on the furniture as a boarding house keeper.

Second. That the furniture was delivered to the defendant in April, 1866, under an agreement, by which he was to have possession of it until the 1st of May, 1867.

The plaintiff, Shafer, claims title to the furniture, under purchase from Miss Henrietta F. Merry, or Henrietta F. Osborn. Miss Merry and her sister boarded with the defendant Guest from the middle of May, 1866, down to the 16th of August, 1866.

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On the 16th of August, Miss Merry left the house of the defendant (without notice to him that she intended to change her boarding place), having locked the doors of the rooms she had occupied, and taking the keys of the rooms with her.

On the 18th of August, two days after she left, she made a real or pretended sale to the plaintiff of the furniture in question, and delivered to him the keys of the rooms where the furniture then was.

A day or two after the sale to the plaintiff, he went to the house and demanded the furniture of Mrs. Guest, the wife of the defendant.

She declined to deliver it; and when she was asked if she had any claim upon it, she said "she did not know how that was, but it had to go through the law.

On the 21st or 22d of August this action was commenced. The sheriff then took and kept possession of the rooms for five or six days, and the defendant did not, &c., gain possession until the latter part of August, 1867.

On these facts we submit, on the part of the defendant and appellant—

First. That his honor, the justice who tried this cause, erred in directing the jury to find a verdict for the plaintiff; and that he should have directed a verdict for the defendant.

Boarding house keepers have now by law the same lien as inn keepers or hotel proprietors. (*Jones agt. Morrill*, 42 Barb. 623).

So long as Miss Merry permitted the furniture to remain in the rooms of the defendant, and kept possession of the rooms by retaining the keys, so long the lien continued; and as the plaintiff did not tender the amount necessary to discharge the lien, or any amount, at the time he demanded possession, the lien shall continue. (*Jones agt. Morrill*, 42 Barb. 623.)

Second. The lien of a boarding house keeper is not con-

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finer to *transient* guests. (*Stewart agt. McCready, 24 How. 62.*)

Nor is he obliged to *assert his lien* when the property is demanded. (*Everett agt. Coffin, 6 Wend. 603.*)

In this case Mrs. Guest did, in substance, claim a lien when the demand was made.

Third. As Mr. Guest came lawfully into the possession of the furniture, no action would lie *without a demand*; and a demand made upon the wife is not sufficient, without showing that the husband could not be found.

As to the second defense set up in the answer, the facts were as follows:

The defendant received the possession of the furniture from Mr. George Wood, in April, 1867, two weeks before Miss Merry came to board with him.

By the terms of the agreement (which were fully communicated to Miss Merry), he was to have the possession of it for one year.

Miss Merry knew that arrangements were being made by Mr. Wood for her board.

She was present a portion of the time when it was being talked over.

She gave Mr. Wood full power to act for her.

And the arrangement, as finally made, was fully communicated to her.

Besides all this, she found the furniture in Mr. Guest's house when she went there; it had been repaired, cleaned, varnished and put in good order by the defendant, and she must have known that this was done under an agreement with Mr. Wood as her agent.

There was also the additional fact that Miss Merry *only* paid \$16 a week for the board of herself and sister, they having the entire second floor of the house.

We submit that on this evidence the jury might have found that the defendant was entitled to the possession of the furniture for one year; and if the jury might have found

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that fact, then the court erred in directing a verdict for the plaintiff.

It is, therefore, respectfully submitted, on the part of the appellant, that both of the defenses set up in the answer were fully established by the evidence, and as there was no conflict of evidence, the court below should have directed a verdict for the defendant.

A. H. REAVEY, *for plaintiff, respondent.*

First. The answer alleged ownership of the property in Miss Osborn; and appellant's wife gave testimony that the property was not Miss Osborn's, but Mr. Wood's.

The defendant was bound by this answer, and could not adduce proof in contradiction without amendment of answer.

Second. The board was paid in full; there was nothing due; consequently, the defendant could acquire no lien.

There cannot be a lien *in presenti* for board that might be owing *in futuro*.

The *answer* does not allege there was to the extent of one cent owing for board, nor is there *any* testimony in the case showing *anything* due.

Third. The defendant was not, and did not claim to be, a *boarding house* keeper, and was not entitled to a *lien* under the statute, even though there was an amount due for board.

There can be *no* lien for *use* or *occupation* of the premises.

Fourth. There being nothing due for *board*, and there not being any conflict of evidence, the plaintiff was entitled to a verdict.

Fifth. The property was demanded before the suit was brought.

Sixth. The judgment appealed from should be affirmed with costs.

ROBERTSON, Ch. J. I cannot find enough evidence in this case to have gone to the jury, upon the question of any

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agreement by the former owner of the furniture in question (Miss Osborn) to allow the defendant the use of it for a year, which formed the last defense set up in the answer. It is very plain that such furniture was only to be employed in furnishing the rooms occupied by such owner, and therefore to remain constantly in her possession. The defendant expressly testified that he was to give such owner and her sister the second floor of his house, and that her agent (Wood) was to furnish it, which he did by means of such furniture. The submission of any such question to the jury would therefore have been improper.

The former owner of such furniture testified that, when she left the defendant's house, she owed him nothing for board of herself or sister, and his receipt was produced for board to the time of her leaving. There was, therefore, nothing due for which the defendant had any lien. Any liability under the agreement with the defendant, for damages, in not boarding, pursuant to it, would not be the subject of a lien, even if the special agreement did not altogether defeat one. (*Trust agt. Pirsson*, 1 *Hilt.* 292.)

If the defendant had been an innkeeper, he clearly could not have detained the furniture in question for mere non-performance of an agreement to board in future with him; and the statute of April, 1860 (*N. Y. Sess. Laws 1860, ch. 446, p. 771*), only gives the keeper of a boarding house a lien upon and right to detain the baggage and effects of a boarder for the amount which may be *due by him*, to the same extent *and in the same manner* as innkeepers have them. Thus limiting the lien to that for board *actually due*, and not including board to become due under an agreement to board in future.

There was, therefore, no question left for the jury to pass upon, and the instruction to find a verdict for the plaintiff was correct.

I am not prepared to say what would have been the rule, if the evidence had clearly established an agreement or a lien.

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As the case stands, I concur in affirming the judgment and order appealed from.

MONELL, J. The defendant, upon his examination as a witness, testified that Miss Osborn was owing him "some" for washing, but not for board. Indeed, the evidence is uncontradicted that, at the time Miss Osborn left the defendant's house, she paid all that was due for board and use of rooms. There was not, therefore, a *present* indebtedness, which was essential to give a boarding house keeper's lien upon the property of his guest. Even if the arrangement made with Wood, that Miss Osborn should board with the defendant for a year, and that he, Wood, would pay the rent, could have been enforced after Miss Osborn left, it would not have created a lien upon the property. The act which provides for the protection of boarding house keepers (*Laws of 1860, p. 771*) gives the lien upon the effects of the boarders for the amount *which may be due for board*, and it cannot be extended to any other indebtedness, nor to any demand not due at the time of the detention. (*Cross on Liens, 43.*)

I do not deem it necessary to look into that part of the case which relates to the second defense, namely, that the defendant claimed to hold the furniture under the agreement made with Wood.

The evidence on that branch of the case was such as in my judgment should have gone to the jury, especially as the uncontradicted testimony of the defendant established that the agreement was communicated and assented to by Miss Osborn, before she became a boarder in the defendant's house. But as no request was made at the trial to submit that or any other question of fact to the jury, it is too late to raise the objection now. (*Winchell agt. Hicks, 18 N. Y. R. 558; Clark agt. Mayor, &c., 24 How. Pr. R. 333.*)

The proof of a demand before suit was, it seems to me, clearly insufficient. But as the objection was not taken at the trial, it cannot be raised now. It was one of those

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objections which might have been obviated by proof; and the attention of the plaintiff should have been called to the defect in his evidence, that he might, with the permission of the court, have supplied it. (*Ryerss* agt. *Wheeler*, 4 *Hill*, 466; *N. Y. & E. R. R. Co.* agt. *Cook*, 2 *Sandf.* 732.)

I think the exception should be overruled, and judgment ordered for the plaintiff on the verdict.

U. S. SUPREME COURT.

THE GALENA, &C., PACKET COMPANY agt. So much of THE ROCK ISLAND RAILROAD BRIDGE as lies within the northern district of Illinois, THE ROCK ISLAND R. R. Co., THE MISSISSIPPI AND MISSOURI R. R. Co., claimants.

A *maritime lien* can only exist upon movable things engaged in navigation, or upon things which are the subjects of commerce on the high seas or navigable waters. Such a lien may arise with reference to vessels, steamers and rafts, and upon goods and merchandise carried by them. But it cannot arise upon anything which is fixed and immovable, like a wharf, a bridge, or real estate of any kind.

Though bridges and wharves may aid commerce by facilitating intercourse on land, or the discharge of cargoes, they are not in any sense subjects of maritime liens.

January Term, 1868.

APPEAL from the circuit court of the United States for the northern district of Illinois.

ROBERT RAE and A. W. ARRINGTON, *for libellants.*

C. BECKWITH and B. C. COOK, *for claimants.*

FIELD, J. The libel in this case is filed against that part of the Rock Island railroad bridge which is situated in the northern district of Illinois, for alleged damages done by that part of the bridge to two steamboats, the property of the libellant, employed in the navigation of the Mississippi river. It alleges that, by law and the public treaties of the United States, the Mississippi river is, for the distance of 2,000 miles,

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a public navigable stream and common highway, free and open to all the citizens of the United States, who are entitled to navigate the same by sailing and steam vessels, and otherwise, without impediment or obstruction; that the Rock Island bridge obstructs the free navigation of the stream; and that by collision with this obstruction the steam vessels of the libellant have been injured, and he has in consequence been damaged to an extent exceeding \$70,000.

In accordance with the prayer of the libel, process was issued and the property attached. The Mississippi and Missouri Railroad Company and others then intervened as claimants, and filed an exception to the jurisdiction of the court to proceed against the property in question in the manner "in which the same is sought to be proceeded against by the libel;" in other words, they objected to the jurisdiction of the court to take a proceeding *in rem* against the property. The exception was sustained by the district and circuit courts, and the libel dismissed. The correctness of this ruling is the sole question presented for our determination.

There is no doubt, as stated by the counsel for the appellant, that the jurisdiction of the admiralty extends to all cases of tort committed on the high seas, and in this country on navigable waters. For the redress of these torts, the courts of admiralty may proceed in *personam*, and when the cause of the injury is the subject of a maritime lien, may also proceed *in rem*. The latter proceeding is the remedy afforded for the enforcement of liens of that character.

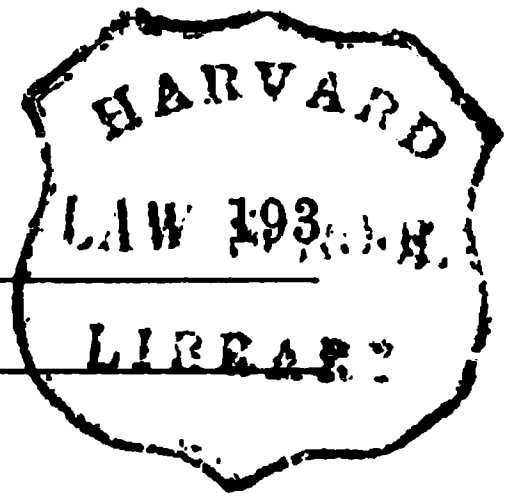
A maritime lien, unlike a lien at common law, may, in many cases, exist, without possession of the thing upon which it is asserted, either actual or constructive. It confers, however, upon its holder such a right in the thing that he may subject it to condemnation and sale to satisfy his claim or damages; and when the lien arises from torts committed at sea, it travels with the thing, wherever that goes, and into whosoever hands it may pass. The only object of the proceeding *in rem* is to make this right, where it exists, avail-

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ble—to carry it into effect. It subserves no other purpose. The lien and the proceeding *in rem* are therefore correlative—where one exists the other can be taken, and not otherwise. Such is the language of the privy council in the decision of the case of *The Bold Buccleugh* (7 Moore, 284). “A maritime lien,” says that court, “is the foundation of the proceeding *in rem*, a process to make perfect a right inchoate from the moment the lien attaches; and whilst it must be admitted that where such lien exists a proceeding *in rem* may be had, it will be found to be equally true that, in all cases where a proceeding *in rem* is the proper course, there a maritime lien exists, which gives a privilege or claim upon the thing to be carried into effect by legal process.”

There is an expression in the case of *The Volant* (1 W. Rob. 38), attributed to *Dr. Lushington*, which militates against this view. He is reported to have said that the damage committed on the high seas confers no lien upon the ship, and this is cited by the counsel of the appellant to show that a maritime lien is not the foundation of a proceeding *in rem*. But the expression is a mere *dictum*, and the privy council in the case cited allude to it, and observe that it is doubtful, from a contemporaneous report of the same case (1 *Notes of Cases*, 508), whether the learned judge made use of it, and add, that if he did, the expression is certainly inaccurate, and not being necessary for the decision of the case, cannot be taken as authority.

A maritime lien can only exist upon movable things engaged in navigation, or upon things which are the subjects of commerce on the high seas or navigable waters. It may arise with reference to vessels, steamers and rafts, and upon goods and merchandise carried by them. But it cannot arise upon anything which is fixed and immovable, like a wharf, a bridge, or real estate of any kind. Though bridges and wharves may aid commerce by facilitating intercourse on land, or the discharge of cargoes, they are not in any sense the subjects of maritime liens. Decree affirmed.



SUPREME COURT.

SAWYER F. PEARSON, respondent agt. ANDREW LOVEJOY,
appellant.

An order of the county court, dismissing an appeal from a justice's judgment, is a final determination of the rights of the parties in the action, and is therefore a judgment within section 245 of the Code of Procedure.

The *personal notice* of the judgment, required by section 353 to limit the time to appeal, means a personal notice from the party who has obtained the judgment; and such notice must also be a *written* notice, or the limitation does not take effect. In cases where there has been no personal service of process, and the defendant did not appear, it was not intended that the important right of appeal should be limited to twenty days after the defendant might be informed by some means of the existence of the judgment.

Statutes giving the right of appeal are to be liberally construed in furtherance of justice; and such an interpretation as will work a *forfeiture* of such right is not to be favored.

A general *appearance* by the respondent in the county court, and *noticing* the appeal for argument, are positive acts of submission to that tribunal, inconsistent with his claim that the appeal was not in time, and therefore a *waiver* of his right to have the appeal dismissed.

Broome General Term, November, 1866.

Before PARKER, MASON, BALCOM and BOARDMAN, Justices.

APPEAL from judgment entered July 29, 1863, upon an order of the Otsego county court, made in September, 1857, dismissing the defendant's appeal from the judgment rendered against him in a justice's court, on the ground that the time to appeal had expired.

The action was commenced by attachment before the justice, and the judgment was rendered for the plaintiff on the 19th of January, 1852. The process was not personally served, and the defendant did not appear. The notice of appeal was not served by the defendant until July 17, 1856, and the justice made and filed his return thereto in August of the same year. On the 14th of February, 1857, the plaintiff, by his attorney, served upon the appellant's attorney notice of appearance on the appeal. In May, 1857, the respondent's attorney noticed the appeal for argument for

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the May term of the county court, and at the same time served a copy of an affidavit made by one Brown, stating that in March or April, 1854, the appellant said that he knew of the judgment, and in August of the same year (1857) he again noticed the appeal for argument upon the return and said affidavit, for the August term of that court. At that time the appeal was moved on for argument by both parties, and the same was heard on the return, affidavit of Brown, and proof of service of the notice of appearance and of the above mentioned notice of argument.

In September, 1857, the county court made an order dismissing the appeal with \$10 costs, on the ground that the appellant's knowledge of the judgment in March or April, 1854, was equivalent to personal notice of it, and that he had lost his right to review the judgment by delaying to appeal from it within twenty days from that time. A judgment was entered, in pursuance of such decision, dismissing the appeal, and the roll filed on the 29th day of July, 1863.

The appellant appealed to the supreme court on the 26th day of July, 1865.

JAMES E. DEWEY, *for appellant and defendant.*

DE WITT C. BATES, *for respondent and plaintiff.*

By the court, MASON, J. The first question to be considered in this case is, whether the order of the county court, dismissing the appeal from the judgment of the justice, is to be deemed a judgment within the meaning of section 245 of the Code. That section defines a judgment to be the final determination of the rights of the parties in the action. It seems to me that, so far as the county court is concerned, it must be regarded as a judgment. The appeal was dismissed on the ground that it was not brought in time. If it appears from the return itself that it was brought in time, and the county court have decided that it was not, and gave judgment dismissing the appeal for that reason, it must be

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regarded as the final determination of the rights of the parties; for there is no redress left to the appellant, and the action in fact is decided in favor of the plaintiff. The principle enunciated in the following cases would seem to hold that this order and the judgment entered thereon must be regarded as a judgment within the spirit and meaning of the 245th section of the Code. (*Talbot agt. Talbot*, 23 *N. Y. R.* 17; 6 *Hill R.* 157; 4 *W. R.* 483; 4 *How. R.* 195; 3 *Comst. R.* 546; 7 *How.* 194; 12 *J. R.* 31.) It is said in the latter case, whether the decision is denominated a judgment, an order, a decree or sentence, is very immaterial. The decision is in effect a final judgment by which the suit is terminated, and the subject in controversy is awarded to one party, against the other. It would seem from the judgment order dismissing the appeal that the whole case was brought before the court, and the return itself read, and the cause was moved on, as well upon the notice of argument as notice of motion to dismiss the appeal, and was thus submitted to the court; and when the decision came, it was a dismissal of the appeal, upon the ground that the appellant was too late in serving his notice of appeal.

The next and more difficult question in the case is, was the appeal brought in time? This question depends upon the construction which is to be put upon section 353 of the Code. That section, regulating appeals from judgments in justices' courts, provides that if the judgment, as in this case, is rendered upon process not personally served, and the defendant did not appear, he shall have twenty days after personal notice of the judgment to serve the notice of appeal, &c. (*Code*, § 353.) It appears from the return of the justice that the judgment was entered on the 19th of January, 1852. The notice of appeal was not served until July 17th, 1856; and the only evidence that the appellant had personal notice of the judgment more than twenty days before the notice of appeal was served, is to be found in the affidavit of Joseph R. Brown, and upon which the notice to dismiss was

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predicated. He swears in that affidavit that in March or April, 1854, he heard the defendant, Lovejoy, say that he knew of the judgment in this action, which was entered before Abram I. Brown, Esq. It is claimed on the part of the plaintiff, in this case, that the admission made to Brown proves that he had personal notice of the judgment. The whole length and breadth of the admission is that he knew of the judgment. Whether he was informed of it by the plaintiff, by the justice, by a stranger, or how he got his information of the existence of the judgment, we are not informed. This, in my judgment, utterly fails to prove that he had personal notice of the judgment, within the meaning and intent of this 353d section of the Code.

Statutes giving the right of appeal are always liberally construed in furtherance of justice, and such an interpretation as will work a forfeiture of such right is not to be favored. (4 *Barb. R.* 636; 1 *W. R.* 395.) The language of that statute itself is quite plain: "He shall have twenty days after personal notice of the judgment." This does not mean twenty days after he shall ascertain by his own inquiries or investigation that such judgment exists against him, but twenty days after he shall receive personal notice of the judgment from the party himself in whose favor the judgment was entered. This, I have no doubt, was the intention of the framers of this statute. The legislature never were guilty of the absurdity of limiting the important right of appeal in such cases as this, where there has been no personal service of process upon the party, to twenty days after he might be informed, by some means, or somehow, and perhaps by a stranger, of the existence of the judgment.

The only reasonable construction which can be put upon this statute is to hold that personal notice means a personal notice from the party who has obtained the judgment. It was said by the court, in *Gilbert agt. The Columbia Turnpike Company* (3 *Johns. Cases*, 107), that a notice in legal proceedings means a written notice. The same is affirmed by

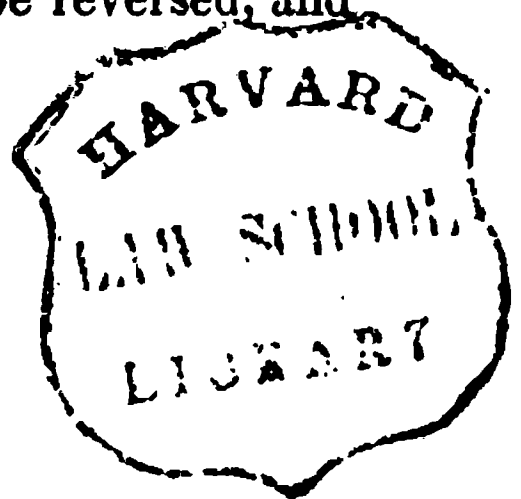
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BRONSON, J., in *Miner* agt. *Clark* (15 *W. R.* 429). The same is again affirmed in *Lane* agt. *Carey* (19 *Barb. R.* 539). The rule is well settled that, where a notice is required or authorized by statute in any legal proceedings, it means written notice. (*See, in addition to the cases above cited, 15 J. R.* 533; 5 *Hill R.* 104; 6 *Abb. R.* 56; 26 *Barb. R.* 248.) This statute must be held to give the right of appeal at any time within twenty days after the party shall receive written notice from the party in whose favor the judgment was obtained. Any other construction would leave the time of appealing in the greatest doubt and uncertainty.

I am of the opinion, for these reasons, as well as for the reason that the plaintiff had waived his right to have the appeal dismissed by his general appearance on the appeal and by noticing the appeal for argument at the May and August terms, that the county court was wrong in dismissing the appeal. They were positive acts of submission to the tribunal whose right to hear the appeal his motion to dismiss questioned. (6 *W. R.* 550; 2 *Comst. R.* 467; 7 *How. R.* 111; 6 *W. R.* 549; 12 *J. R.* 204; 10 *Paige R.* 615 and 616; 27 *How. Pr. R.* 335.)

The judgment of the county court should be reversed, and that court directed to hear the appeal.

Decision accordingly.



COURT OF APPEALS.

RICHARD M. HOE and others, respondents agt. JESSE SANBORN, appellant.

An order affirming an order of the special term, denying a motion for a *re-taxation of costs*, and to correct the judgment roll, is not appealable to this court.

An order dismissing an appeal from an order of the special term, refusing a *mandamus*, is not appealable to this court.

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An order dismissing an appeal from an order of special term, denying a motion to correct or re-settle the case, is not appealable to this court.

But an appeal from the judgment brings up for review the order in relation to the re-taxation of costs and the correction of the judgment roll. The question as to which party is entitled to costs is a matter of strict legal right, and necessarily involves the merits.

Where there is a general warranty of the quality of an article, express or implied, the rule of damage for the breach of such warranty is the difference between the value of the article, if it had corresponded with the warranty, and its actual value.

Where there has been no disaffirmance of the contract by the purchaser of a warranted article, which he retains, and he is sued for the price, he can only recoup his damages for the breach of the warranty; and in estimating such damages, the vendor should be allowed the actual value of the article.

January Term, 1867.

PARKER, J. The appellant, in his notice of appeal, states that he appeals from the judgment in the action, and from three several orders of the supreme court, which he specifies.

The respondent, at the last September term of the court, moved to dismiss the appeals from the orders, when the court directed the motion and the appeal to be heard together.

The orders thus appealed from are:

First. An order affirming an order of the special term, denying a motion for a re-taxation of costs, and to correct the judgment roll.

Second. An order dismissing an appeal from an order of special term refusing a *mandamus*.

Third. An order dismissing an appeal from an order of special term, denying a motion to correct the case.

These orders, clearly, do not come within the class of orders described by subdivision 2 of section 11 of the Code; for neither of them, in effect, determines the action and prevents a judgment from which an appeal might be taken. Nor does subdivision 3 of that section include them. That subdivision authorizes an appeal from a final order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment. None of these orders was a *final* order in the action. They were all made pending the appeal to the general term from the judg-

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ment entered upon the verdict. One of the them is denominated, in the notice of appeal, an order dismissing an appeal from an order *refusing a mandamus*, and is claimed to be an order in a *mandamus* case. That is manifestly a mistake, as all the papers relating to that motion, which are entitled at all, are entitled in this action. This is true of the order to show cause, of the order denying the motion, of the notice of appeal from that order, and of the order of the general term dismissing the appeal, which is the order here appealed from, and it is described in the notice of appeal to this court, which is entitled in this action as the order made in this action at a general term thereof, dismissing the appeal from the order of the special term refusing a *mandamus*.

This is the only occasion in which a *mandamus* is alluded to in the whole course of the proceedings in reference to that motion. The order to show cause makes no allusion to it, and there is nothing in the proceedings indicating that they have, in fact, any reference to a *mandamus*. It is impossible now to treat them, or the order in which they have resulted, otherwise than as a proceeding in the action.

None of the orders appealed from being final orders, are the subjects of an appeal to this court, and the appeals therefore should be dismissed.

The first subdivision of the section authorizes this court, upon an appeal from a judgment, to "review any intermediate order involving the merits, or necessarily affecting the judgment." So that we are brought to the question whether these orders are reviewable under that provision.

The first of these orders, is the order in relation to the re-taxation of costs, and the correction of the judgment roll.

The appeal from the judgment, I think, brings up this order for review. The question involved is, which party is entitled to costs, and this being a matter of strict legal right, may well be held to involve the merits, as such questions have been treated in the supreme court. (*St. John* agt. *West*, 4 *How.* 329; *Tallman* agt. *Hinman*, 10 *How.* 89.) I

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have no doubt that the motion at general term was decided correctly, and the order therein made properly affirmed. The plaintiff was entitled to costs. The action is "for the recovery of money," and the plaintiff has in it recovered more than fifty dollars. It is true that the verdict of the jury was for but \$10.84. But the action was upon a promissory note for \$467.88. The defendant admitted that the plaintiffs were entitled to recover the whole amount of the note, except \$150 and interest; and as a condition of putting the cause over the circuit, upon his motion, imposed by the court, stipulated that the plaintiffs might enter judgment for the amount so admitted, without costs, the cause to proceed as to the amount of \$150, and all other matters in controversy in the action. Judgment was entered upon the stipulation, and subsequently the action was tried at the circuit, upon the claim of the \$150, and resulted in a verdict for \$10.84.

The plaintiffs, in the judgment entered upon the verdict, recited the entry of the former judgment, and having had their costs of the action adjusted, inserted them also in the judgment.

The defendant insists that the judgment should be the ordinary judgment upon a verdict, omitting all reference to the former judgment, and that he is entitled to costs, and not the plaintiffs.

The case is entirely within both the letter and the spirit of the statute which gives costs to the plaintiff "in an action for the recovery of money, when the plaintiff shall recover fifty dollars." This the plaintiffs have done in this action. It is to be remembered that the defendant had offered to the plaintiffs judgment for the amount of the demand, less \$150 and interest, which had been declined. At the time of the giving of the stipulation, the question of costs rested upon the reducing the recovery to the amount offered. If the plaintiffs should recover any part of the \$150, they would be entitled to full costs, and that question of costs constituted the "other matters in controversy," reserved in the

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stipulation from being affected by the judgment to be entered thereon.

In regard to the correction of the judgment, it follows that the order of the special term was right, so far as any question of substantial right is concerned, if the order as to costs was correct. As to any formal correction, whether it should have been made or not, was a question of practice, and not reviewable here.

The second order complained of is the order dismissing the appeal from an order of special term, denying a motion that the judge who tried the cause re-settle the case by inserting therein the following words: "The defendant requested the court to charge the jury that, if they find from the evidence that the saw was not as warranted, the return of it absolved the defendant from the payment of the price. The court refused so to charge, and defendant excepted.

And the third order of which a review is sought is the one dismissing an appeal from an order of the special term, denying an application to the court to correct the case by inserting the same matter.

Whether the general term was right or not, in holding that these orders were not appealable, becomes entirely immaterial, in the view which we take of the case upon the merits, as well in respect to the decision of the special term, sought to be reviewed by the appeal to the general term, as to the judgment itself. The action was upon a promissory note for \$467.88. The defense was, that the note was given for circular saws, which were warranted to be of a good quality; that they were not of a good quality, but entirely worthless. Upon the trial, no question was made upon the breach of warranty, except in relation to one of the saws purchased, the price of which was \$150. The uncontradicted evidence showed that the saw was sold by the defendant to John Howard & Co., of Michigan, and sent to them; that they, upon trial, finding it bad, had sent it to the plaintiffs in New York, as directed by defendant, in case it should be so

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found, and again received it from the plaintiffs, after it had been retempered and reduced an inch in diameter; but not choosing to try it again, they sent it to defendant at Sandy Hill, of whom it was purchased by Brown & Anderson, of Michigan, and sent to them, though not by defendant's personal order. There is no other evidence in this case showing any return of the saw to the plaintiffs. Upon this state of facts, the refusal to charge as requested was, if it occurred, clearly right. The saw remained with defendant, and he had sold it, instead of returning it to the plaintiffs as worthless, so that his request to charge "that, if the jury found that the saw was not as warranted, the return of it absolved the defendant from the payment of the price," was based upon an assumption of facts wholly unwarranted by the evidence, his exception to the refusal could avail him nothing.

If, then, we should conclude that the orders were, in their nature, appealable, so that the general term ought to have considered them on the merits, seeing as we do that the motions before the special term were properly denied, and that the effect of the dismissal of the appeals is precisely the same upon the judgment under review, as an affirmance of the orders would have been; the error in the mode of arriving at the result, if there was one, is, as the case now stands before us, manifestly of no consequence.

We are brought, then, to a consideration of the exceptions taken upon the trial of the cause.

The jury were instructed, if from the evidence they should find a warranty of the saw, and a breach of that warranty, and that the saw was worthless as a saw, that the plaintiffs were entitled to be allowed the value of the saw as old iron or steel. The defendant excepted to this charge, and requested the court to charge that, if the saw was worthless as a saw, the defendant was entitled to a verdict. This the court refused to charge, and the defendant excepted. The jury found for the plaintiffs only the value of the saw as old iron or steel; that is, they found a warranty, the breach, and

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that the saw was worthless as a saw, a verdict the most favorable possible to the defendant, unless they had taken the view insisted upon by the defendant, that, if the saw was worthless as a saw, the defendant was entitled to a verdict.

The court, I think, was right in the instruction given. There has been no disaffirmance of the contract by the defendant, and when he was sued, as he was, for the price of the saw, which he had retained, he could only *recoupe* his damages for the breach of the warranty.

The warranty, whether considered as express or implied, was nothing more than a general warranty of quality, and the rule of damage for the breach of such a warranty is well settled to be the difference between the value of the goods, if they had corresponded with the warranty, and their actual value (*Muller* agt. *Eno*, 4 *Kern*. 606; *Voorhees* agt. *Earl*, 2 *Hill*, 208; *Cary* agt. *Gruman*, 4 *Hill*, 625); or, as stated in *Cary* agt. *Gruman*, upon the breach of the warranty of the quality of an article, the vendee is entitled to "such sum as, together with the cash value of the defective article, shall amount to what it would have been worth if the defect had not existed." That is what the jury were directed to give in this case.

I do not discover any foundation, either in justice or in law, for the distinction which the defendant's counsel contends for, between the case when the article is wholly and that when it is only partially unfit for the use for which it was intended, provided in each case it has some intrinsic value. In the one case, equally with the other, if the article had been retained by the vendee, he should, in estimating his damage, allow the vendor for the actual value of the article, and this is the doctrine of the cases.

There being no warranty that the saw was fit for any specific use, there is no opportunity for the application of the rule that the vendee is entitled to such damages, beyond those contemplated by the rule above stated, as were the

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natural and necessary consequences of the breach, which has been applied to cases when the warranty has been so specific. (*Passenger* agt. *Thorburn*, 35 *Barb.* 17; *S. C.* 34 *N. Y. R.* 634.) It is only to such cases that this rule has been applied. It was said in *Hargous* agt. *Ablon* (5 *Hill*, 473): "A warranty or promise concerning a thing being general, that is to say, not having reference to any purpose for which it is to be used out of the ordinary course, the law does not go beyond the general market in search for an indemnity against its breach." (See also *Milburn* agt. *Belloni*, 34 *Barb.* 607.) The offer to show the damages which the defendant had sustained consequent upon the failure of the saw to operate was therefore properly overruled.

There was no error in the admission of the testimony of the witness Lorick as to the value of the saw as old iron or steel. He had been in the business of manufacturing saws thirteen years, and for an equal length of time before had been a blacksmith, and was familiar with the material and quality of saws. These facts were, at least, *prima facie* sufficient to show him competent to speak of the value per pound of old iron or steel, and of the weight of such a saw. That the evidence itself is competent, appears from what has already been said in regard to the propriety of allowing the value shown by it to the plaintiffs in the estimate of damages.

As the jury found a warranty and the breach already mentioned, it is unnecessary to examine the exceptions arising upon the admission or rejection of evidence with reference to the fact of the warranty. Whether those rulings were right or wrong, they have not prejudiced the defendant.

Upon the whole case, we are of the opinion that the judgment should be affirmed with costs.

All concur.

Affirmed.

McHarg agt. Eastman.

N. Y. SUPERIOR COURT.

RUFUS K. MCHARG agt. ALBERT L. EASTMAN.

In an action against a *trustee* of a manufacturing corporation incorporated under the general law of the state, to recover the penalty—the debt contracted by the corporation—for neglecting to file an annual report required by said act, the complaint is fatally defective where it does not allege that the *debt was existing at the time the default was made* by the trustees to file their report.

Where the complaint does not allege that the debt against the corporation is unpaid, or that it was unpaid when the trustees failed to make their report, but avers that the judgment (which was previously recovered against the corporation for the debt) and debt have been assigned to the plaintiff, and “there is now due to the plaintiff from the defendant the sum of \$899.04,” the complaint *held* defective within the case of *Chambers agt. Lewis* (28 N. Y. R. 454).

The complaint in such an action must also allege that the defendant *was a trustee at the time of the default*. An allegation that he has at all times been *president* of the corporation, although the president must be selected from the trustees, and is necessarily a trustee, is not sufficient as an allegation against him as trustee. The defendant must be sued as trustee, and not as president.

General Term, February, 1867.

ROBERTSON, MONELL and GARVIN, *Justices.*

THE complaint alleged that the defendant was one of the trustees of the Washington Medallion Pen Company, organized under the general incorporating act of this state. That the certificate of incorporation was filed February 10, 1857. That said company purchased machinery and gave their promissory note for the price thereof; upon which note an action was brought against the company, judgment recovered, and an execution thereon returned unsatisfied. That the said debt and judgment were afterwards duly assigned to the plaintiff. That said company has not annually, within twenty days from the first day of January, of any year since its organization, made and published a report, as required by the eleventh section of the said act. That the business of the company was carried on in the city of New York. The complaint demanded judgment for the amount of the judgment against the company, with interest.

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The defendant demurred to the complaint that it did not state facts sufficient to constitute a cause of action.

The demurrer was overruled, and the defendant appealed.

Mr. FULLER, *for appellant.*

Mr. SAWYER, *for respondent.*

By the court, MONELL, J. The reference in the complaint to the "eleventh" section of the general manufacturing law, instead of the twelfth section of said act, which prescribes the duties of corporations in respect to making annual reports, was apparently a mere error of the draftsman or copyist of the pleading. It is wholly immaterial. Public statutes need not be recited or even referred to in a pleading. It is sufficient if the case is brought within the statute. (*Bayard agt. Smith*, 17 *Wend.* 88; *Cole agt. Jessup*, 10 *How. Pr. R.* 524.) In pleading a private statute or a right derived therefrom, it is sufficient to refer to such statute by its title, &c. (*Code*, § 163.) The reference, therefore, to the eleventh section was mere surplusage, and the error must be disregarded; more especially, as all question is removed by a subsequent averment in the complaint that such company has not published and filed any such reports as is required by "said law."

The liability imposed by the act upon trustees of manufacturing companies for neglecting to file an annual report is in the nature of a penalty for misconduct in office. (*Bird agt. Hayden*, 2 *Abb. Pr. R. N. S.* 61.) The penalty imposed is the debt contracted by the corporation.

Although the recovery of a judgment against the corporation extinguishes the debt as to it, I do not think that such recovery affects the penal liability of a trustee. A judgment is a debt, and the extinguishment of the simple contract debt, and its merger into the higher debt, does not in terms, nor by implication, discharge the liability of a trustee. It may operate as a bar to another action against the corporation,

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but it lays no foundation for an action against a trustee. Such latter action is not for the recovery of the debt, but to recover a penalty, the measure of which is regulated by the debt.

While the statute does not require a judgment against the corporation, as preliminary to charging a trustee, as is required to fix the liability of stockholders, in certain cases, it does not forbid such a judgment. The liability is for a debt contracted by the corporation, but the judgment is not evidence of such debt, nor is the amount of the judgment the sole measure of damages against a trustee. Trustees are only liable for their own default or misconduct, and not for the default or misconduct of their predecessors or successors in office. (*Boughton* agt. *Otis*, 21 N. Y. R. 261; *Shaler* agt. *Hall Quarry Co.* 27 *Id.* 297.) Hence, it must appear that the penalty was incurred while they held office. So, an action to recover such a penalty must be brought within three years after the cause of action shall have accrued. (*Code*, § 92, sub. 2; *Merchants' Bank* agt. *Bliss*, 21 *How. Pr.* 365; *S. C.* 13 *Abb. Pr. R.* 225.) The debt, therefore, must exist at the time of the default, and be contracted by the corporation while the trustees sought to be made liable are in office; and the statute has reference to such debts and no others. (*Boughton* agt. *Otis*, *supra.*) A different construction would render the three years limitation nugatory. A creditor could delay suing a corporation upon its contract until the day immediately before that on which the statute of limitations would attach; and then, having obtained judgment, wait nearly three years longer before attempting to charge the trustees; and then allege the judgment to be the debt, and that the statute began to run only from its recovery.

Upon the construction I have given the statute, the "debt" for which the trustee may become liable is the original debt contracted by the corporation, and not the judgment which the creditor may have recovered against the

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corporation. The recovery of such judgment was, therefore, unnecessary, and the allegations in the complaint in respect to it entirely immaterial. It did not extinguish the debt, in the sense that the trustee would not be liable for his own default; nor did it become any material fact in the statement of the plaintiff's cause of action.

But the complaint is defective, I think, in not averring that the debt was existing at the time the trustees were in default by omitting to publish their annual report, or was contracted afterwards.

The debt was contracted on the 3d of April, 1863. For such debt the trustees in office at the time became liable, by omitting to file a report within twenty days from the first day of January, 1864. The complaint does not allege that such debt was existing at the time default was made by the trustees.

The judgment was recovered October 24, 1863, and it is alleged that an execution was at the same time issued, which has been returned unsatisfied. It is not alleged that the judgment or the debt against the corporation is unpaid, or that it was unpaid when the trustees failed to make their report; the only averment being, that the judgment and the debt have been assigned to the plaintiff, and "there is now due to the plaintiff from the defendant the sum of three hundred and ninety-nine dollars and four cents." Whether such amount is due upon the judgment, or for the debt, or upon the defendant's liability as a trustee, or otherwise, does not appear.

This criticism of the complaint is justified by *Chambers* agt. *Lewis* (28 N. Y. R. 454).

Again, the statute makes the trustees liable; but it is not averred in the complaint that the defendant was a trustee at the time of default, unless the allegation that he has at all times been president of the corporation is to be regarded as sufficient. The president, it is true, must be selected from

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the trustees, and is necessarily a trustee; but, I think, he must be sued as a trustee, and not as president.

For the reasons assigned, I am of the opinion that the facts stated in the complaint are not sufficient to constitute a cause of action; and that, therefore, the demurrer should have been sustained.

The order overruling the demurrer should be reversed, and judgment rendered for the defendant thereon, with costs; with leave to the plaintiff to amend his complaint, on payment of such costs.

No costs to either party on the appeal.

SUPREME COURT.

WILLIAM TRACY and others agt. WILLIAM T. VEEDER and OWEN H. GUFFIN, impleaded with others.

There is but one form of *order of arrest* prescribed in the Code, and that is contained in section 183. All orders of arrest must contain the requisites therein stated. They must require the sheriff to arrest the defendant and hold him to bail; and must require this to be done in a specified sum.

The order of arrest issued under subdivision 3 of section 179 must be in form conformable to section 183, the same as an order issued in any other case; and is not required to be in a sum equal to double the value of the property, as stated in the affidavit of the plaintiff accompanying the replevin papers.

Consequently, where the order specifies the sum in which the defendant is to be held to bail at less than double the sum stated in the affidavit, it does not make the order void; and being for the benefit of the defendant, he cannot move to set it aside on that ground.

An order of arrest is not defective because it omits to *recite the subdivision* (of § 179) under which it is issued. Although this would be a convenience, and probably would be better to incorporate such fact in the order, yet it cannot be regarded as absolutely obligatory, because the statute does not require it; and the court must be careful not to put into the statute words which it does not contain.

On a motion to discharge an order of arrest, where there is no sufficient evidence produced that the order was issued under subdivision 3 of section 179, the motion cannot succeed, where it is conceded by the mover that, if the order was not issued under that subdivision, it is unobjectionable.

A defendant cannot succeed on a motion to set aside an order of arrest, by claiming that it was issued under subdivision 3 of section 179, in reference to a *concealment* of the property, which he attempts to explain satisfactory, but upon which

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point there is contradictory evidence, while the plaintiff's case is almost undenied upon the point—which is the *gravamen* of the complaint, that *false and fraudulent representations* were made by one of the defendants in the purchase of the property on credit, which would bring the action under subdivision 1 of section 179.

If the defendants, in an action for claim and delivery, claim the benefits of the purchase of the property, which it is alleged was made by their agent fraudulently, although they allege a want of knowledge of such fraudulent purchase, they thereby indorse the agency.

Every ratification of an assumed agency is equivalent to an original authority.

Where the plaintiffs institute proceedings for the claim and delivery of personal property, and thereby obtain a *portion of it*, they do not thereby waive an *order of arrest* against the defendants for the recovery of the remainder, or for damages for its detention, on the ground that the order of arrest must be applicable to the *entire cause of action*, and not to a part only; and that the plaintiff could not issue execution against the person of the defendants for the portion of the property in the plaintiffs' possession, and therefore could not issue such execution at all; and if not, an order of arrest would be equally improper.

The delivery of a portion of the property to the plaintiffs under the proceedings in replevin is not decisive of their right to retain it. That question has yet to be decided in the action. If decided adversely to the plaintiffs, they must restore all they have thus acquired. If the plaintiffs succeed, they will have judgment for the delivery of so much of the property as they have not already received, or for its value, if not obtainable.

Therefore, the execution can go for no larger amount than the defendants are really bound to pay, nor for anything or any amount for which an execution against the person may not legally issue.

Albany General Term, March, 1867.

Before PECKHAM, MILLER and HOGEBOM, Justices.

APPEAL by defendants from order of special term refusing to vacate order of arrest.

The defendant Veeder was arrested and held to bail, in Albany county, upon papers and affidavits tending to show that he obtained the goods, for the recovery of the possession of which this action was brought, from the plaintiffs, who were merchants in New York, by false representations of the solvency and condition of a firm in Cohoes, to whom they were sold, of which firm he was supposed or represented himself to be one, in connection with the defendant Guffin; and also tending to show that when the sheriff came to seize the goods, at the store in Cohoes, the defendants concealed them, endeavored to prevent access to the store, and to prevent the identification of the goods. Many of these allegations were denied in the opposing affidavits used to resist the

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motion at special term, and were also to some extent corroborated by supplementary affidavits on the part of the plaintiffs.

The motion to discharge the order of arrest was founded principally upon the ground that the application for the order of arrest was under the 3d subdivision of section 179 of the Code, which is as follows: "3. In an action to recover the possession of personal property unjustly detained, where the property, or any part thereof, has been concealed, removed or disposed of, so that it cannot be found or taken by the sheriff, and with the intent that it should not be so found or taken, or with the intent to deprive the plaintiff of the benefit thereof;" and that the evidence did not make out a case under that subdivision; and also that the order of arrest (which was in conformity with the language of section 183 of the Code) was irregular and void, in that it did not specify the cause of arrest, as required by section 187 of the Code, so as to enable the defendant to give an undertaking in conformity with section 211 of the Code, as specified in section 187.

The value of the property was sworn to be about \$1,250, and the sum specified in the order of arrest on which the defendant was to give bail was \$1,300.

The other material facts appear in the opinion.

R. W. PECKHAM, Jr., *for plaintiffs, respondents.*

N. C. MOAK, *for defendants, appellants.*

HOGEBOM, J. In this case, I have come to the following conclusions:

1. The order of arrest, assuming it to have been made under subdivision 3 of section 179 of the Code, was correct in point of form.

There is but one form of order of arrest prescribed in the Code, and that is contained in section 183. The present order conforms to it, and I think it governs all cases of orders

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of arrest. All orders of arrest must, I think, contain the requisites therein stated, and I do not deem it indispensable that they should contain any other characteristics. As to some of them, it would be quite convenient, and not improper, that they should do so; but I do not see that it is imperative. Every order, it is plain, must require the sheriff to arrest the defendant and hold him to bail. I think every order must require this to be done in a *specified sum*. It is conceded that this is so in ordinary cases, but claimed that it is not so under subdivision 3; or rather (if I understand the argument), that it must be, under subdivision 3, in a sum equal to double the value of the property as stated in the affidavit of the plaintiff accompanying the replevin papers (§§ 187, 211), and that in this case it is not such a sum, but a *less* sum. I think a *less* sum would not make the order void; and being for the advantage of the defendants. they could not set it aside on that ground. I do not find *this* affidavit among the papers, as it should be for the purposes of the defendants, although it is probable from other papers that the alleged value was some \$1,250, while the sum named in the order of arrest was only \$1,300.

The order is said to be defective because it does not recite in effect, that it was issued under subdivision 3 of section 179. I see no impropriety, but a convenience that it should be so; but I do not think it obligatory. It would be quite proper—certainly not prohibited—that when issued under other subdivisions of that section, it should recite the fact; but it is not indispensable, and in practice is known to be quite unusual. Why should it be exacted in the one case more than in the other? If because a different undertaking is required, the answer is, it is always essential to know which kind of undertaking is to be given. How is this to be known? In various ways: (1.) It *may* be specified in the order, and that is the best way. (2.) It may be ascertained from the papers on which the order is granted, or from the statement of the attorney on which, if the sheriff do not

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choose to rely, he may perhaps demand an indemnity, certainly, I think an inspection of the preliminary papers and opportunity to take advice about them. This may occasion inconvenience and delay, and I therefore agree, that it is better to incorporate the fact in the order; but I cannot regard it as absolutely obligatory because the statute does not require it. We must be careful not to put into the statute words which it does not contain.

2. There is no sufficient evidence that the order was granted under subdivision 3 of section 179, and if not, it is conceded to be unobjectionable.

It is true some of the affidavits tend to show what is relied on as a *concealment* of the goods, to wit: a locking up of the store, a destruction of the trade-marks, and a refusal to identify; but these may well have been relied on as evidence of fraud to characterize and aggravate the previous conduct of the parties, rather than as making out by themselves, an independent ground of arrest, founded on the act of concealment. The *gravamen* of the charge seems to rest upon the supposed want of title to the goods in the defendants, growing out of the fraudulent representations of Veeder, as to the persons composing the firm, its solvency, the amount of capital put into the business and other representations of that character, which would have no influence on the question of concealment. Thomas J. Strong, one of the plaintiffs, in his affidavit, which is among those on which the order of arrest was founded, speaks of the action in the following language: "That this action for damages for the wrongful detention and for the claim and delivery of possession of the goods mentioned in the said affidavit of the said William, and of this deponent, was commenced on the 16th day of November, 1866." At all events, the action being capable of being classified under subdivision 1 of section 179, I think we are not called upon to locate it under subdivision 3, in order to nullify an order, which would otherwise be indisputably valid.



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3. If these observations are well founded there is no ground for setting aside the order of arrest, as granted upon insufficient evidence, or being without foundation on the facts, whatever may be said of the strength of the defendants' case on the question of concealment, as furnishing a plausible reason why the door of the store was kept locked, and why the trade-marks were removed from the goods, (and even in *these* respects, I should incline to retain the order on the ground that defendant's allegations in these particulars, are to a considerable extent, repelled and overcome by the original affidavits for the order of arrest, and the supplementary affidavits on this motion); the plaintiffs' case is almost undenied upon the point, that false and fraudulent representations were made by William T. Veeder, as to the membership of the firm, the solvency of the firm, the capital embarked, in it, and the material effect these representations had in inducing the credit. It is quite clear that such representations made by the purchaser would vitiate the sale, and entitle the vendors to reclaim the goods. It is supposed their unfavorable influence is obviated by declaring William T. Veeder not to be a partner, and that the partners never authorized such representations, and were ignorant of the fact of their having been made; and yet Caroline A. Veeder does not disclaim them, and if both partners denied them, I think it would not alter the case. They disclaim the agency of William T. Veeder, and yet they sent him to make the purchase, they received the goods, and they insist upon retaining them. They cannot thus repudiate the agent, and yet appropriate to themselves the fruits of the agency. As their title comes through a polluted chanel, it is corrupted and worthless. If they claim the benefit of the purchase, they must be held responsible for the means by which it was consummated. If they were ignorant of them at the time, they must, when knowledge comes, make their election between repudiating it altogether, or accepting it with the burdens which accompany it. This they have done. They insist on the benefit of the

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purchase, and they thereby indorse the agency. Every ratification of an assumed agency, is equivalent to an original authority.

Nor is the assignee of the partners protected from the operation of this rule. Not being a purchaser for a valuable consideration, he stands in no better position in this respect than his assignors, and the property is equally subject to be reclaimed by the vendors as if it were still in their hands.

Perhaps it is a more difficult question to say whether Guffin is subject to an order of arrest for the fraud of Veeder. Were it necessary to decide the question, I should be inclined to say he was, if he *adopted* it, and must be held responsible for the frauds of the agent, if he accepts the ill-gotten gains acquired by the fraud, as well on the score of liability to arrest, as on the score of losing title to the property itself. But the question does not seem to arise. Under subdivision 1 of section 179, the defendant may be arrested in all cases, where the action is for wrongfully taking or converting property; and under subdivision 3, in all cases where the defendant has participated in the act of concealment, as it is not denied that Guffin did, if there was any act of guilty concealment.

4. The remaining question is, to state it in the language of the defendants: whether the plaintiffs having instituted proceedings for a claim and delivery of the property, and thereby obtained a portion of the goods whereof possession was sought, waived and were not entitled to process to arrest the defendants, or either of them.

I am not sure that I precisely comprehend the position of the defendants, but I understand it to be this: that as the order of arrest must be applicable to the *entire* cause of action, and not to a part only, and as the plaintiffs by their process did, before the order of arrest was granted, obtain possession of a part of the goods replevied (although only \$20 in value), here was a portion of the goods for which, being in plaintiffs' possession an execution against the person of the defendants,

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could not issue, and hence such execution could not issue at all; and if not, an order of arrest would be equally improper. The delivery of the property, however, to the plaintiffs under the proceedings in replevin, is not decisive of the right of the plaintiffs to retain it. That question has yet to be decided in the action. It may be decided adversely to the plaintiffs, and in such event the plaintiffs must restore all they have thus acquired. If the plaintiffs succeed, they will have judgment for the delivery of the property, or for its value; but I think only for the delivery of so much of it, as they have not already received, and if not obtainable only for the *value* of so much as should have been delivered. There is no possibility, therefore, that the execution can go for any larger amount than the defendants are really bound to pay, nor for any thing, or any amount, for which an execution against the person may not legally issue.

As I understand the proposition, it is not well taken.

These embrace all the points presented. I think none of the objections to the order of arrest are tenable, and that the order of the special term should be *affirmed*, with ten dollars costs of appeal.

PECKHAM, J., concurred.

MILLER, J. wrote an opinion for affirmance.

COURT OF APPEALS.

EUGENE S. BALLIN and others, executors, &c., appellants agt.

CHARLOTTE B. DILLAYE, impleaded, &c., respondents.

Where a *married woman* purchases real estate and executes a *bond and mortgage* to secure a part of the purchase money, on a foreclosure of the mortgage and sale of such property, her separate estate is chargeable in equity with the payment of any *deficiency* on such sale. Her obligation arising from the execution of the

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bond, was for the benefit of her separate estate. And her separate estate, as a whole, becomes liable for any indebtedness contracted by her for its benefit.

September Term, 1867.

PARKER, J. The action in this case was brought to foreclose a mortgage executed by the defendant, then and now a married woman, and her husband. By stipulation of the parties judgment of foreclosure and sale was entered, leaving the question of the liability of the defendant upon her bond for the deficiency, if any there should be, to be determined after it was ascertained that such deficiency existed, and the amount of it.

A sale of the mortgaged premises was had, and a deficiency reported of \$6,643.73, and interest from February 2, 1864.

The defendant acquired her title to the premises by purchase upon a previous mortgage sale in favor of the Merchants' Bank, on the 14th day of November, 1860. At the time of such sale the plaintiffs held a mortgage, junior to the one on which the premises were sold, upon the same premises, for about \$8,000; and on that day the parties entered into the following agreement, viz. :

"I, Charlotte B. Dillaye, by and with the assent of Stephen D. Dillaye, my husband, testified to by his writing herein, do agree with E. S. Ballin and others, executors of Martin Cone, as follows :

"1. I recognize the bond and mortgage held by them as valid.

"2. I agree to pay or secure the same.

"3. As the executors would bid on the property to the extent of said mortgage, and it is my wish they should not do so, I agree to secure said mortgage by a new mortgage, to be executed and delivered simultaneously with the filing of the affidavits of sale under the mortgages held by the Merchants' Bank of Syracuse.

"There are certain thirty-two lots not to be embraced in the new mortgage. The property is the Rust farm, and is so described in the mortgage to the executors. The prop-

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erty is mortgaged also to the further amount of some \$7,000, advanced this day by the executors to extricate the title from embarrassment."

In pursuance of this agreement the bond and mortgage in question in this action were, on the 14th of November, 1860, executed by the defendant and her husband.

After the report of sale in this action, showing the deficiency, the question of the liability of Mrs. Dillaye for the deficiency came up for trial at special term, upon which trial the plaintiffs put in evidence the judgment roll in foreclosure; also the said agreement, the bond accompanying the mortgage foreclosed, the report of the sale and deficiency, and the proceedings in foreclosure of the Merchants' Bank mortgages, and offered to prove that the defendant, Charlotte B. Dillaye, at the time of giving said bond and mortgage, was possessed of a separate estate from her husband of \$10,000; to which the counsel for said defendant objected, and the court sustained the objection; to which ruling and decision the plaintiffs' counsel excepted.

The plaintiffs then offered to show that Mrs. Dillaye sold several lots, which she purchased under the Merchants' Bank foreclosure, and which she had previously contracted away to other parties, the same being left out of the mortgage in question, under the stipulation. To this the defendant's counsel objected. The objection was sustained, and the plaintiffs' counsel excepted.

The court found and decided as follows:

"This action coming on for trial upon the question reserved as to the personal liability of the above named Charlotte B. Dillaye to pay the deficiency after the sale of the mortgaged premises; and after hearing the proofs and allegations of the respective parties, and after hearing counsel, I have come to the conclusion that no judgment can legally be entered up against her for such deficiency. This conclusion is based upon the stipulation of the parties, and the judgment roll in foreclosure, as to the facts. As a matter of law

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I hold that a married woman is not personally bound by her agreement to pay the purchase price of real estate which she purchases for her separate property, although she has a separate estate."

Upon this decision judgment was entered for the defendant, which, upon appeal to the general term, was affirmed, and from the judgment of affirmance the plaintiffs appeal to this court.

Although the terms of the conclusion of law stated by the court seem to look only to the personal liability of the defendant, and not to that of her separate estate, they must be construed as excluding her estate from the liability also; for the case calls for a decision of that question, and that was regarded as the question by the general term. Besides, if the case shows her estate liable, the decision, in either view, is equally erroneous. The acts of 1848 and 1849, for the more effectual protection of the property of married women, did not remove the general disability of married women to bind themselves by their contracts; but the power conferred by those statutes to hold to their separate use, and to convey and devise, all their real and personal estate, as if unmarried, carried with it the power to charge such estate substantially in the manner and to the extent previously authorized by the rules of equity in respect to separate estates. (*Yale agt. Dederer*, 18 N. Y. R., 265; *S. C.*, 22 N. Y. R., 450.)

The rule, as recognized and established by the courts of equity in this state, is stated by the chancellor, in *Gardner agt. Gardner* (7 Paige, 112), as follows: "The wife may have a separate estate of her own, which estate is chargeable in equity for any debt she may contract *on the credit of, or for the use of* such estate." Again, in the *North American Coal Company agt. Dyett* (7 Paige, 9), the same learned chancellor says: "The *feme covert* is, as to her separate estate, considered as a *feme sole*, and may in person, or by her legally authorized agent, bind such separate estate with the payment of debts contracted *for the benefit of the estate*, or for her

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own benefit upon its credit." In *Curtis agt. Engel* (2 Sandf. Ch. R., 287), the complainants filed their bill as creditors of Mrs. Engel, the defendant, to charge the indebtedness upon her separate estate. The learned assistant vice-chancellor SANDFORD, said: "In order to maintain their suit they must show that the debt was contracted either *for the benefit of her separate estate*, or for her own benefit, upon the credit of the separate estate. Whatever may have been the expressions of judges on the subject, this is the utmost extent to which the doctrine has been carried by the decisions in this state."

This rule is fully recognized and asserted in *Yale agt. Dederer* (*supra*), and in *White agt. McNett* (33 N. Y. R., 371).

That the defendant, in the case at bar, had a separate estate, we may assume, although not in terms found by the court, both because the stipulation and judgment roll referred to in the judge's decision show it, and because of the exclusion of the plaintiffs' distinct offer to prove it.

Whether the obligation which the defendant took upon herself, when she executed the bond and mortgage to the plaintiffs, was, in view of the undisputed facts of the case, for the benefit of her separate estate, in such sense as to make such estate liable, depends upon a legal construction, and is, therefore, open for consideration in our review of the case.

That the arrangement between these parties, by which the defendant was, by the aid of the plaintiffs, enabled to purchase the mortgaged premises, with the additional thirty-two lots, was a transaction with reference to her separate estate, is but a self-evident proposition, for the premises so purchased were either the whole or part and parcel of her separate estate. The bond and mortgage in question were given as a part of that transaction, to enable her to acquire that separate estate; and with reference to that property, at least, it is impossible to deny that the obligation was entered into by her for the benefit of such separate estate.

The estate thus obtained was not the mortgaged premises exclusively, but thirty-two lots in addition, and these, or

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their proceeds, are in themselves a separate estate, benefited by the undertaking of the defendant to pay the money secured by the bond. I do not understand how it can be said that a debt contracted upon the purchase of property which the purchaser takes into possession and enjoys, is not a debt contracted for the benefit of the purchaser's estate. (3 *Allen*, 541; 6 *id.*, 300; 7 *id.*, 504; 8 *id.*, 387).

In *White* agt. *McNett* (*supra*), where the action was against a married woman, with her husband, upon a guaranty executed by her and her husband, contained in the transfer of a mortgage belonging to her, that such mortgage was collectable, it was assumed that, if she had received the proceeds of the sale, she would have been liable.

Moreover, in this case \$7,000 of the money secured by the bond and mortgage was advanced by the plaintiffs to extricate the title "of the property purchased by her from embarrassment." It can scarcely be denied that this money went to benefit her estate, and the debt contracted by her for it was for the benefit of her separate estate.

I have no doubt, therefore, that, in the case at bar, the obligation which the defendant took upon herself, by the execution of the bond, was for the benefit of her separate estate, which is, therefore, chargeable in equity with the payment of the deficiency in question. In such case the liability attaches, not as a specific lien on any particular portion of her estate, but upon the whole of it.

Her separate estate, as a whole, becomes liable for any indebtedness contracted by her for its benefit to any extent, as it was held in *North American Coal Company* agt. *Dyett* (*supra*, and 20 *Wend.* 570), where the indebtedness arose for coal furnished to a factory held in trust for Mrs. Dyett, that the rents and profits of a house in New York, a portion of her trust estate, were held liable to be reached for the indebtedness.. (See also 3 *Allen*, 541; 6 *Id.* 300; 7 *Id.* 504; 8 *Id.* 387.)

The defendant's counsel insists, however, that the fact that

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she had a separate estate cannot be considered, because not set up in the complaint, and the court was and is bound to consider the case upon the issue found by the pleadings; and for the reason that the stipulation by which the plaintiffs were allowed to take judgment for foreclosure and sale, reserving the question of defendant's liability for the deficiency, requires such restriction. The language of the stipulation, so far as this question is concerned, after stating that this defendant has appeared and answered, "claiming by her answer that, by reason of her coverture, she is not legally liable for any deficiency in the sale;" and after allowing the plaintiffs to enter a decree for the sale of the premises, and to take such steps as may be necessary to enforce said claim according to law, proceeds as follows: "And that in case any deficiency arise upon the sale, under the decree of sale to be entered in such case, no judgment shall be entered against said Charlotte B. Dillaye, until such time as the legal question whether she is liable to a judgment against her for such deficiency shall be tried and decided, on the issue so raised by her answer as aforesaid, by this court."

I do not think this stipulation, by any fair construction of it, confines the court to any narrower rule or mode of trial than if the same question had been tried in its natural order, without any stipulation. The whole scope of the stipulation is to allow the foreclosure and sale, to which there was no defense, to take place, so that the fact whether any deficiency would occur might be learned before entering upon a trial which might, or might not, as that fact should turn out, be entirely nugatory.

The language, "shall be tried and decided on the issue so raised by her answer as aforesaid," is but the pointing out of the portion of the case which is reserved for trial in the court that it shall become pertinent to try it in. Such is the natural and obvious construction of the language used, and no inference arises that the trial of that issue is not to be conducted precisely as if the trial were had before the decree or

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foreclosure and sale. Notwithstanding the stipulation, it was competent to the court, upon the trial, to allow an amendment of the pleadings, and, inasmuch as the fact that defendant had a separate estate was relevant and material, and the plaintiffs made no objection on the ground that it was not set up in the complaint, the defendant must now meet the case as if that fact were proved.

The same is true in regard to the fact offered to be proved, that the thirty-two lots were left out of the mortgage.

It is proper, therefore, to consider the case upon the assumption that the defendant had a separate estate. Being of the opinion, for the reasons above stated, that such estate is liable for the deficiency in question, I think the judgment appealed from is erroneous and should be reversed, and a new trial granted; costs to abide the event.

All reverse, except DAVIES, Ch. J.
Reversed.

N. Y. SUPERIOR COURT.

THOMAS C. DURANT, respondent agt. LEWIS EINSTEIN and
others, appellants.

A court of equity has no general jurisdiction over actions to redeem personal property *pawned*, without some other circumstances rendering its interference necessary.

The remedy at law is ample, by tender of the amount due and a possessory action to recover the articles pledged, or damages for their detention.

The only ground of equitable jurisdiction over an action for the redemption of personal property pledged, besides the necessity of a *discovery*, and perhaps an *assignment of the pledge*, is the necessity of *taking an account*.

It is fully settled that the *account* on which equity bases its jurisdiction must be really one; that is, not having only one item on one side and a number of set-offs on the other, but a series of transactions on both sides.

Where an action is brought to redeem certain securities in the hands of the defendants, as stock brokers, upon paying the amount due thereon, and for an injunction order restraining the defendants from selling such securities until an account can be taken of the amount due the defendants, it cannot be sustained where it appears that the claim on the part of the defendants can only consist of one item—the original advances by them, or so much of it as remains unpaid.



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Every sum paid or to be credited in that account forms a subject of set-off in an action at law, even including any liability of the defendants, as alleged in the complaint, for selling any of the original pledged stock below its market price; as such liability forms a subject of counter-claim in an action for the loan, under the first subdivision of section 150 of the Code.

Unliquidated damages, for an entirely unauthorized sale of pledged stocks or securities, can form no part of an *account* to give jurisdiction to a court of equity.

Sales of stock below the market price, when duly authorized, would not make the brokers liable for the difference, unless made with an *intent to injure* the principal, beyond the mere regulation of the amount due the brokers, as in other cases of abuse of lawful authority. But something besides a mere sale below the market price is necessary to show such intent.

Brokers who are mere pawnees are not bound to use even the same diligence as an agent to obtain the best price. The latter would not be held liable except for extraordinary negligence, which must be proved, not presumed. There must at least be such recklessness shown in the mode or time of selling as to establish an intent to injure the pawnors, before the pawnees can be made liable for any loss. The plaintiff is bound to make out his case affirmatively, and although this court on appeal at general term cannot properly interfere with any decision at special term, founded on conflicting evidence, it may yet do so where that on one side is mere information and belief, and that on the other positive knowledge.

Upon the evidence in this case, the plaintiff has hardly made out a clear case of sales at higher prices, or of any design by the defendants to lower the market value of the securities; and the mere fact of reporting fictitious sales is not sufficient to sustain the injunction order.

At General Term, 1868; heard March 19, 1867; decided March 9th, 1868.

Before ROBERTSON, Ch. J., MONELL and GARVIN, Justices.

APPEAL from an order and decision of Justice McCUNN, at special term, August, 1867. The facts will sufficiently appear in the opinion given at special term, as follows:

McCUNN, J. This is a motion to dissolve a temporary injunction.

The defendants, on the 11th of January, 1867, agreed to carry for plaintiff ten thousand shares of the preferred stock of the Chicago and Northwestern Railroad Company, and to pay for the same at \$10 (per share) less than the market value thereof, which was then \$80 per share.

This agreement was to extend three months, plaintiff agreeing that, if the stock during that time fell below eighty, he should then keep in the defendants' hands a clear margin of \$10 per share, and in default of his not doing so, defend-

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ants had the privilege of selling the stock at public or private sale, with or without notice.

Under this agreement defendants received the ten thousand shares, and advanced to the plaintiff thereon \$700,000.

The plaintiff alleges that, by the custom of brokers and bankers and business men, the defendants should refrain from all acts that would affect the value of the stock, and that they should not do anything that would depreciate the stock in market. He also alleges that the price of the stock was to be determined by the sales made at the New York Stock Exchange, which held two sessions each day, and at the Open Board Exchange, which held three sessions each day.

Plaintiff further says that on the 20th of January the stock fell below \$80 per share, and at defendants' request he deposited \$80,000 as additional margin.

That on the 23d of January defendants made further calls for additional security or margin, and plaintiff then deposited with defendants one hundred land grant bonds of the Union Pacific Railway Company, Eastern Division, each of the value of \$1,000, amounting in all to \$100,000. These bonds the defendants agreed to accept as security, rating them at \$50,000 in cash. That on the 24th of January, 1867, the defendants again called for more security, and plaintiff gave them a note for \$25,000, made by the Union Pacific Railroad Company, together with twenty-five bonds of the company, each worth \$1,000, as collateral security, and which defendants received as \$25,000 in cash. (This note was paid.) That after business hours, and late on the 24th of January, plaintiff deposited with defendants, as additional security, \$10,000 in cash, and sixty shares of Pacific Mail Steamship Company's stock, of the value of \$10,494. All the foregoing allegations are substantially admitted by defendants' papers.

Plaintiff further says that on the close of the day of the 24th of January, he, plaintiff, had fully complied with the

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contract on his part, and had requested the defendants to carry the 10,000 shares of preferred stock agreed upon.

Plaintiff further alleges that, on said 24th day of January, 1867, at about half past three o'clock, he gave notice to the defendants that next day he would take up 2,000 shares of preferred stock, and pay for the same, and would leave the whole of the additional security in defendants' hands as collateral to the remaining 8,000 shares. He also alleges that on the same day he notified defendants that next day he would take up and pay for an additional 3,000 shares of the preferred stock, or as much more as was required to make the margin perfectly secure, and would leave all the additional securities as collateral to the remaining 5,000 shares.

He also alleges that by the custom of the market he had until quarter past two, on the 25th of January, to do this, and that he was ready and willing, on the said 25th, at 11 o'clock, to do so, and notified the defendants to that effect, when defendants replied they had sold all said 10,000 shares of the preferred stock. And they thereupon rendered him an account sales, which they claim to be strictly true and accurate, and which showed a large balance in their favor, for the making good of which they claimed the right to sell the 100 land grant bonds and the 66 shares of the Pacific Mail Steamship stock pledged as before stated. Plaintiff, however, alleges this account of defendants to be incorrect and untrue. Untrue in this, that defendants sold the said preferred stock not in a legitimate way, and much below the market value. And he further says, that if the stock had been estimated at a fair market value, the margin in their hands at the time they sold his preferred stock was amply sufficient, and more than sufficient, to have enabled defendants to carry the said 10,000 shares of preferred stock.

All these allegations are absolutely and positively denied by defendants.

So that the principal question in the case is, whether the defendants acted legally and fairly in selling and disposing

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of the 10,000 shares of the preferred stock of the Chicago and Northwestern Railroad Company, and under which sale they claim to have a large balance against plaintiff, or whether they connived to break down the market value of said stock, and sold the same secretly and below its market value; and that by reason thereof he is not in their debt, and that therefore he is entitled to have an accounting, and to have returned to him the 100 land grant bonds and the 66 shares of the Pacific Mail Steamship Company's stock.

He further claims that if, after an accounting, there is any sum due by him to defendants, he is ready and willing to pay the same, and now offers to do so, and receive back his pledges.

In the meantime he prayed for and received the temporary injunction of this court, restraining the defendants from disposing of said 100 land grant bonds and said 66 shares of the Pacific Mail Steamship Company's stock.

The motion now before me is one on the part of the defendants to set aside that injunction and allow the defendants to sell and dispose of the land grant bonds and the Pacific Mail Steamship Company's stock, so as to enable defendants to satisfy the alleged balance due by plaintiff to them; and for the purposes of this motion they rely mainly on two facts:

First. They say that the statements presented by them are so strong and overwhelming that the court would be fully justified in dissolving the injunction.

Second. They allege that in a former action in the supreme court of this district, which action was discontinued before this suit was commenced, a motion was made to set aside a similar injunction, and was granted, and afterwards affirmed at general term on behalf of defendants; and they now contend that the decision on that motion by the supreme court should bind this court, or at least, in a great measure, warrant me in granting their motion here.

Unfortunately, the judges of the supreme court, both at

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general and special term, assign no reasons for dissolving the injunction, and give no opinion in the case. We are therefore left uninformed as to the method or line of reasoning they adopted in disposing of the motion.

On the hearing before me, it was asserted by counsel for plaintiff, and admitted by the other side, that, at the argument at the general term of the supreme court, the justices would not allow, or, in other words, would not consider, the additional affidavits offered on the part of plaintiff to support the sworn complaint, notwithstanding the fact that the defendants had moved to set aside the injunction upon a large number of new affidavits in addition to the answer.

Now, this fact alone is enough, in my mind, to take this case, so far as this motion is concerned, without the pale of the rulings of the supreme court on the former motion. The practice in all the districts of the supreme court of this state, with the exception of the first district, and the uniform practice of this court, enables the plaintiff, where the defendant moves on a sworn answer and additional affidavits to set aside an injunction granted on a sworn complaint alone, to put in counter affidavits to support his sworn complaint.

Mr. Justice WOODRUFF, in the case of *Fowler agt. Burns* (7 Bosw. R. 637), in a most learned and able opinion, settles this question fully, and the rulings in that case must be conclusive with me in this. Counter affidavits were not allowed to be read in the proper sense of the word in the case in supreme court, and, as I have said before, that is enough to warrant me in disregarding the course pursued by the supreme court on the result of the motion there.

Moreover, the investigation in the supreme court was, as it is in this court, entirely discretionary, and does not involve an investigation upon the merits in open court with witnesses heard, but only an investigation of a preliminary and partial character, upon affidavits.

The interlocutory proceedings of a court are of no impor-

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tance, except in the suit itself. This is a preliminary trial for an injunction—an injunction *pendente lite*, not a demand for a final adjudication—and the only thing for a court to do in such a case is to determine in a summary manner whether plaintiff should have an injunction during the pendency of the action.

Again, the action in the supreme court was an action for the recovery of the original securities; alleging a fraud in respect to the preferred stock, claiming damages in a large sum of money, and praying the court for judgment that defendants hand plaintiff back his *preferred stock*.

The prayer of that complaint shows that the plaintiff demanded as final relief, that the defendants' pretended sales of the plaintiff's preferred stock be declared null and void, and that the defendants be required to return the 10,000 shares to the plaintiff and recovery of heavy damages.

That action was to get the preferred stock back again; to repudiate their sale by the defendants, and compel them to replace it; and then, that they should be compelled to surrender the other collaterals on the same ground. Plaintiff, in that action, did not offer, as he does in this, to pay them any balance, if any should be found in their favor, but claimed that they had unlawfully dealt with the preferred stock, on the ground that their transaction in it was fraudulent.

This action is brought for the recovery of the collaterals; two lots—one of bonds, and the other of Pacific mail shares—put up as a pledge or security, under a new and separate agreement; and the complaint is filed to redeem that pledge. Defendants admit that they were put in as collaterals, as pledges, and they have accordingly rendered an account. But plaintiff denies that account, and states facts going to show that that account should be investigated, in order to ascertain whether any thing is due them or not. He does not ask the stock from defendants. He asks, simply, the privilege of paying any balance found against him, and redeeming the pledged collaterals. And, to my mind, the rem-

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edy he is now seeking, if the allegations in his complaint be true, is the correct remedy.

Defendants have a pledge from plaintiff for a balance. They claim that plaintiff owes \$74,000 or \$75,000. Plaintiff denies that it is any such sum; but says, whatever the amount may be, he is entitled to ask that it be first ascertained by the court what he does owe, (if any thing,) in order that he may have a chance to pay it. A pledgor has a right to an account, and to have a decree of a competent court to settle the same, if that account is disputed. This he has a right to ask. (*Willard's Equity Jurisprudence*, 456. *See the numerous cases cited in notes.*)

A court of equity has always jurisdiction of such claims. A man with a pledge in his hand cannot dispose of it without regard to the pledgor's rights. He cannot be judge, jury and sheriff, when there is any dispute about the subject pledged. It is the right of the party to be heard in open court, before his property is sacrificed.

A prudent pawnee, where there is a question about the amount, gives the proper notice to the pledgor, and brings his action in equity to foreclose the pledge and have it sold, and have the amount due him determined; and in all cases where the pledgor shows that there is a question as to the amount, and wants to redeem his property, and is ready to pay, he has a right to come into a court of equity and ask the proper relief.

The rule of equity, in regard to an injunction, is this: that where the relief sought by the action will fail unless there be an injunction pending the suit, and where the plaintiff gives security, a temporary injunction should be granted, otherwise the whole object of the action fails.

The pledge of a million of dollars of Chicago and North Western Railroad preferred stock, was a pledge by a written instrument, with a waiver in it; while the pledge of the property the plaintiff is now seeking to recover was a simple

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pledge, with no waiver; a new agreement, so far as these securities are concerned.

The 10,000 shares of preferred stock that plaintiff put in as the first pledge against the \$700,000 was pledged with a condition and a waiver. The condition was to keep the margin good within \$10 a share of the actual market of the stock. On the default of that condition, the pledge would be forfeited, and the parties rights as pledgee to enforce it would immediately arise. It may be well to examine hastily here what are the parties rights in this action, even if the defendants be correct in saying, that the land grant bonds and the Pacific Mail Stock were a part and parcel of the original contract.

In the first place, if there is no waiver in the agreement, the pledgee's rights are to demand a satisfaction, and give the party a reasonable time to make the satisfaction good, and then give him notice of sale before they sell his pledge. Without these three things he cannot sell:

First. There must be a demand.

Second. It must be a demand reasonable in time; and,

Third. There must be notice.

In this case the defendants testify positively there was a demand and notice, but this is as positively denied by plaintiff.

The doctrine of pledges is clear; the pledgee never can sell, unless there be a waiver, without first calling upon the party, if he is within reach, and requiring him to make his pledge good, and then giving him notice before he sells. A waiver of notice is not a waiver of demand. (*Wilson agt. Little*, 2 N. Y. R., 443.)

In that case it was held expressly that where there was a contract, saying that a party might sell without notice, it did not authorize a sale without a demand, and without calling on the party to fulfill. The borrower agreed that the vendor could sell without notice, but not that he could sell without demand of payment; and the law of this court is, that where

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there was a waiver of the notice only, a demand was not waived.

The rule that a demand is necessary, notwithstanding the waiver of notice, is held also in *Lewis agt. Varnum* (12 *Abbott Pr. Rep.*, 305), and in the very recent case of *Genet agt. Howland* (45 *Barbour Rep.*, 560). The notice given was not equivalent to a demand. The demand must be a requirement to pay and redeem, and a reasonable time for payment and redemption must be allowed.

In *Milliken agt. De Bow* (27 *N. Y. R.*, 364), there was a consignment of cotton, and the consignor was to keep the margin good; and it was held that the consignee could not sell in that case; that he must demand the margin before selling. He had leave by contract to sell without notice; but that was not enough. Demand was not waived. The question in that case was, whether a demand was necessary, and the necessity was declared by the court.

In *Andrews agt. Clarke* (3 *Bosworth Rep.*, 585), it was held, that the plaintiff was not in default, so that the defendant had a right to sell, though they had given him notice that they anticipated a fall on a certain day; that the pledgee could not sell without the fall first occurring, and then giving him notice, so as to cut off his equity of redemption.

In *Merwin agt. Hamilton* (2 *Duer Rep.*, 244, 251), the pledgees were held liable because they did not make demand of judgment and give notice of sale. It is clear, therefore, that a party in default, without any special arrangement, is entitled to two things:

First. His property cannot be sold at the will of the pledgees without their first making a demand upon him, in order that he may be enabled to prevent its being sacrificed; and,

Second. He is entitled to notice of sale.

But if demand and notice were both complied with, and before the sale the plaintiff places himself in a position to tender his money and redeem his pledge, that is enough to entitle him to its return.

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In a case of this magnitude, where a plaintiff charges on the oath of several persons, that all his property was earmarked by having his own special power attached, and that through the instrumentality of that special power plaintiff learned that instead of defendant's selling his stock at the prices mentioned in the account rendered by them, they sold it at a much higher rate; and although this is all positively denied by defendants and by the affidavits of several other persons, yet if the statement be true, and it seems to be the main issue in the case, that plaintiff's preferred stock were so marked that defendants could identify the same, and they knew at the time of selling that it was his stock, I would hold, as matter of law, that he is entitled to be credited with the full price received by them for the same. Under these circumstances, I would not be justified in depriving the plaintiff of any and every right to which in equity and in law he is entitled, to enable him to have a fair investigation, in open court, with witnesses there present, so that the proper doubt can be awarded by the court to testimony where it is merited, and where the plaintiff offers abundant security, thereby amply indemnifying the defendants, if they are successful. I see no just reason why I should not, in furtherance of justice, sustain the preliminary injunction.

The plaintiff must give a new bond in \$25,000, with good and sufficient sureties, indemnifying defendants against any loss in case he fails in the action. This, together with the securities now in the defendants' hands, will be abundant indemnity while they are awaiting the final action of this court.

J. LAROCQUE, *for defendants, appellants.*

First. The orders of the special term of the supreme court dissolving the injunction there, and of the general term affirming that order on the plaintiff's appeal, were made between the same parties, by a court of competent jurisdiction, and upon the same subject matter directly in issue there. The whole matter is therefore *res adjudicata*, and those orders are a bar to the proceeding by injunction in this court. (*Dwight agt. St. John*, 25 N. Y. 203; *Demarest agt. Darg*, 32 N. Y. 81; *Bangs agt. Strong*, 4 Comst. 315; *Ogbury agt. La Farge*, 2 Comst. 113; *Mercein agt. The People*, 25 Wend. 64.)

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I. It was decided at special term upon full consideration of its merits, as presented by pleadings and affidavits. That order having been affirmed by the general term, remains an adjudication upon the merits, notwithstanding that two of the judges in *banc* thought that the plaintiff had not even made a case by his complaint for an injunction.

II. It does not help the plaintiff that, for the purpose of endeavoring to escape from the effect of those orders, he afterwards saw fit to discontinue his action in that court. Those orders remain in full force and effect as adjudications, notwithstanding the discontinuance.

III. Such trifling with legal process, and seeking to make the rounds of courts and judges, in the hope of finding some one who would be favorable to his suit, and in the meantime obtaining the forced credit desired by thus prolonging the struggle, only makes the case worse for the plaintiff, and deserves, in addition, the severest reprobation at the hands of the court.

Such abuses will never cease until they are thus visited.

Second. The additional abuse was practiced, in this case, of taking possession of the securities, the sale of which is now sought again to be restrained, under proceedings for the claim and delivery of personal property; obtaining full counter security for their return by the defendants, if return should be adjudged; and when that proceeding failed in its design of embarrassing and preventing a sale, discontinuing it, in its turn, and commencing a new action for an injunction, by which the defendants have now again been restrained (without any fault of theirs on account of want of diligence) more than six months.

1. The plaintiff is estopped by his allegations in the claim and delivery proceedings, *claiming that he was entitled to the immediate delivery of the property, without any account or tender, and that it was wrongfully withheld from him by the defendants*, from now alleging that there was any embarrassment in the way of his availing himself of that proceeding. (*Code*, § 207.)

II. This is trifling with the solemnity of oaths, in addition to trifling with legal process.

Third. The case made by the present complaint for an injunction is no better than the one made in the supreme court, which was adjudged to be insufficient; and the grounds taken and sustained there are equally applicable here.

I. The plaintiff claims, in his present complaint, that the defendants, when they sold his stock, had no right to sell.

II. They were then guilty of a conversion, and his proceedings by the provisional remedy for claim and delivery of the securities held as margin were, therefore, the appropriate remedy. (*Scott agt. Rogers*, 31 N. Y. 676.)

III. His allegations as to the land grant bonds, that they have "an actual and prospective value to the plaintiff much greater than the present market price thereof, and are not readily saleable, nor at all saleable at auction for such actual value," make no case for an injunction. The court does not grant injunctions to have the effect of a stay law preventing the collection of debts, nor to enable a debtor, owing a debt *in presenti*, to keep his property applicable to its payment, in order to take the chances of its prospective speculative value. If they have a prospective value greater than the present market value, he can redeem them by paying his debt, or buy them in at the sale to be made by the defendants.

IV. He had judicially approved security in the replevin proceedings which he voluntarily discontinued, *in double their market value, for their return, if a return should be adjudged at the end of that suit.*

Fourth. All the allegations of the complaint, on which the claim to the injunction rests, are fully and positively denied by the sworn answer of the three defendants,

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directly responsive, swearing to matters both necessarily within their personal knowledge, and stated to be so. The defendants were, therefore, entitled to the dissolution of the injunction, in accordance with the settled rule on that subject. (*Blatchford* agt. *New Haven Railroad Company*, 5 Abb. 276; *Finnegan* agt. *Lee*, 18 How. Pr. R. 186; *Gould* agt. *Jacobsohn*, Id. 158; *Hoffman* agt. *Livingston*, 1 Johns. Ch. R. 211; *Roberts* agt. *Anderson*, 2 Id. 202; *Skinner* agt. *White*, *Court of Errors*, 17 Johns. 357; *Manchester* agt. *Dey*, 6 Paige, 295.)

Fifth. The written contract between the parties required no notice to be given to make good the margin when impaired, before selling. The plaintiff was bound to see to that at his own peril. The extraordinary fluctuations on the 24th and 25th of January are the best evidence of the wisdom and reasonableness of the defendants in absolving themselves from such an obligation, as they did by their contract. *Nor was any demand of payment of the loan necessary, nor could one be made—the sixty days allowed the plaintiff by the contract not having expired.* Repeated demands were made on the 24th and 25th for the increased margin to which the defendants were entitled by the terms of the contract, as is indisputably shown by the papers, and that was the only demand which could be made.

The judge at special term, throughout his opinion, confounds the idea of the necessity of a demand and notice of sale, as preliminaries to selling the Chicago and Northwestern preferred stock, with that of the necessity of such demand and notice before selling the land grant bonds and Pacific Mail Steamship Company's stock. The latter never have been sold. The very object of the injunction is to restrain their sale; and it is undisputed that demand of payment of the balance of the account was made, and notice of sale given of the latter, before the commencement of this action.

Sixth. By reference to the appeal papers in the supreme court, the court will see that the plaintiff, in that case, attempted by his complaint and moving papers to make out two "customs and usages," as applicable to his case; the one debarring the defendants, while pledgees of his stock, from dealing on their own account in stock of the same company; the other giving him until 2:15 P. M. of the 25th to take up his stock, in pursuance of what it suits him to represent as a "notice of intention" to take it up, given on the preceding day. He there procured the allegation of the applicability of this latter usage to the contract in this case to be apparently supported by the affidavits of witnesses. This was met on the part of the defendants, as will appear by reference to their printed brief in that court, "Point Fifth," and to those appeal papers at the folios stated opposite that point.

In the present complaint, the claim of the first usage is abandoned, apparently as untenable; but the plaintiff, with the same remarkable versatility in adapting allegations to suit the exigency, to which attention has already been called, *claims to have been entitled until 3 o'clock to take up the stock (this allegation being sworn to by his agent, Crane); and in connection with that, introduces the affidavits of the same witnesses who had testified in the supreme court, making it 2:15 P. M., one of those affidavits being again Crane himself.*

To this proposition the defendants answer:

I. No evidence of usage can be received to control or vary the clear and explicit provisions of the written contract in this case, giving the defendants a right to sell the instant that the margin should be no longer good. The claim that the express purpose of that provision can be defeated by the plaintiff, when called on under it to make his margin good, giving notice that he will take up some of his stock; and a delay of twenty-four hours thus obtained, is puerile.

II. For the purpose of seeing in what manner affidavits were procured in the former case, and how affiants took back what they had been made to appear to say,

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when they came to understand it, it will be useful also to compare the affidavits of Howes and Norwood, read on the part of the plaintiff in that case, with the subsequent depositions of the same witnesses, taken on the part of the defendants, under compulsory proceedings; also those of Kohn and Minzesheimer, procured by the plaintiff (supreme court), with those of the same witnesses made after explanation of what was claimed to be the purport and effect of what they had there sworn to. Compare also Towar, supreme court, with same in this court. See, also, Winthrop and Fearing, in this court. The whole makes an overwhelming case against the plaintiff, on the issue thus raised by him.

III. It is to be borne in mind that, in the supreme court, the motion to dissolve the injunction was made on the defendants' answer alone, the defendants insisting that by the settled practice in that court, in this district, when so made, rebutting affidavits could not be read on the part of the plaintiff. (*See Blatchford agt. The New Haven Railroad Company*, 7 Abb. 322.) The learned judge of that court, at special term, however, departed from that rule; whereupon the affidavits so procured by the plaintiff were read, and leave was given to the defendants to rejoin, which they did by procuring explanatory affidavits of the plaintiff's own witnesses, among others. In this court, however, in which a different rule prevails, the affidavits on the part of the defendants were necessarily served with the motion papers, and the plaintiff was at full liberty to use on the hearing new affidavits not served; a liberty which he availed himself of by going through the same process with new witnesses which had already been gone through with *and neutralized* in the supreme court, as above shown.

IV. The new affidavits thus obtained by the plaintiff could, no doubt, have been as easily neutralized as the former ones, if there had been an opportunity. The whole evidence on this subject only serves to exemplify most forcibly the absurdity of testimony from laymen by *ex parte* affidavits, as to the legal construction of written contracts.

V. Instead of a "notice of intention to take up stock," what actually occurred was a *special promise to do so the first thing in the morning*, in consideration of the defendants' not selling on the afternoon of the 24th, as they had a right to do.

Seventh. The explanations given in the answer as to the hours at which the sales of the plaintiff's stock were made, viz., during the time while the second call of the first board was in progress, and during the interval between the first and second boards, and of the reasons why, from a desire to afford the plaintiff every opportunity to fulfill his promises of the day before, and redeem his stock, they were not commenced earlier, when higher prices were being attained, and why, of course, the market having gone on rapidly falling, and there being every prospect of its continuing to do so, they were not delayed after those promises had been broken, until the afternoon boards, when, as it turned out, somewhat higher prices were again obtained, relieve the case of all embarrassment from the published bulletins of the stock board of its earlier and later sessions, and from the affidavits accompanying them, even if the having obtained too low prices for the stock would be a ground for an injunction against selling the plaintiff's securities, which it would not.

I. It is distinctly sworn to that the stock sold during the second session of the first board even down to 56, and that the published bulletins by no means give all the sales which are made by parties in the room during the session.

II. All these matters as to the prices and the fairness of the sales are fully and amply corroborated by the affidavits of the defendants' brokers, procured after the case made on the part of the defendants on that subject had been attempted to be assailed on the part of the plaintiff in the supreme court.

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Eighth. The defendants had a right to use the stock certificates, with powers attached, received by them from the plaintiff, on other sales made by them, so long as they always retained 10,000 shares in any shape applicable to the plaintiff's claim. This, it is distinctly sworn, they always did. The affidavits introduced by the plaintiff, therefore, that in some instances the certificates delivered on sales made for account of others than the plaintiff were the identical certificates received from him, amount to nothing. (*Horton agt. Morgan*, 19 *N. Y. R.* 170; *Saltus agt. Gennin*, 3 *Bow.* 257.)

Ninth. All allegations of unfairness in making the sales, and of fraud in reporting sales made on account of others as sales of the plaintiff's stock, are fully rebutted by the answer and affidavits read on the part of the defendants. The judge, in deciding this cause at special term, treats the case as though it were enough that there is a substantial controversy to entitle the plaintiff to the extraordinary remedy by injunction. It is submitted that the rule is *directly the reverse*; and he must make it appear that his *equity is clear*, and his *necessity is urgent*. This is, in every aspect—as to the responsibility of the defendants, not here attempted to be assailed (although it was in the supreme court, with what result the papers there will show)—as to the absence of equity—as to the willful throwing away of full security for the protection of all legal and equitable rights by the plaintiff, after he had placed himself in a position to exact and had obtained it—as to the employment by the plaintiff of the process of courts for the purpose of accomplishing other than the avowed objects—as far, probably, from being such a case as any ever presented.

The suggestion that the defendants have sufficient security, even if true, is not entitled to avail the plaintiff. *Their right is to sell for the realization of their debt, and they are not to be deprived of it, especially when it is clear that they are abundantly responsible to make good any damage which the plaintiff may sustain.* (*Code*, § 219; *Willard's Eq. Jur.* 342; *Redfield agt. Middleton*, 7 *Bow.* 649.)

Tenth. For these reasons the order below should be reversed, and the injunction vacated, with costs.

C. TRACY, for plaintiffs, respondent.

I. The plaintiff has a clear right to bring this action for an accounting and to redeem the pledge of Land Grant Bonds and Pacific Mail Steamship Company stock.

(1.) The defendants are liable to account for their transactions in the preferred stock; for the sums advanced, sums received, sums collected, sales, prices and times of sales, &c.; and the plaintiff has a right to a judgment establishing a just balance as between him and the defendants.

(2.) The plaintiff has a right to the aid of a court of equity to redeem his pledge.

Although where there is no dispute about the amount due on a pledge, the pledgor may redeem by tendering the amount, or the pledgee may collect the amount by selling the property, yet whenever there is a dispute about whether anything or what amount is due, either party can come into equity to have the balance determined and the redemption or payment enforced (*Willard's Equity*, 456. "An action in equity by the person to redeem the property pledged has frequently been sustained." *Hart agt. Ten Eyck*, 2 *J. Ch.*, 62, 100; 2 *Story's Equity Jur.*, 1031; *Curtis' Equity Precedents*, 88; *Equity Draughtsman*, 171.)

The plaintiff is ready to day, if he is found to owe, and to pay such sum if any shall be found against him. But he denies that such a sum as the defendants claim or any sum, is due on the pledge. The pledge is merely a security for payment, and the plaintiff is content to leave the bonds and Pacific stock in the hands of the pledgees pending the action, and he adds further security by undertaking. It is obvious

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equity that the court enjoin the defendants from selling the pledged property, at their own pleasure, while they have perfect security for anything which may be their due, and while they do not even bring a suit to assert or enforce their demand, in which the present plaintiff could contest the claim for a balance.

II. The accounting sought in this action relates to all the transactions between the parties on the loan in relation to the Chicago and Northwestern Railway Company stock, and includes the investigation of the defendants' sales.

The plaintiff impeaches those pretended sales on the following grounds:

(1.) The defendants, as pledgees of the preferred stock, had no right to sell it, unless the plaintiff had become in default to furnish margin, and the defendants, after such default had occurred and a reasonable time before selling, demanded payment from the plaintiff, or required him to redeem the pledge.

In the absence of special stipulations in the contract, it would be necessary not only to demand payment or redemption, but also to give notice of the time and place of sale. In the present contract notice of sale is waived, but demand is not waived. The defendants had no right to sell without first demanding that the plaintiff pay up and redeem the pledge. (*Cortelyou agt. Lansing*, 2 *Caine's Cases*, 200; *Wilson agt. Little*, 2 *N. Y. R.*, 443—448, affirming *S. O.*, 1 *Sandf.*, *S. U. R.*, 361; *Lewis agt. Varnum*, 12 *Abbott*, 305; *Genet agt. Howland*, 45 *Barb.*, 560; *Milliken agt. Dehon*, 27 *N. Y. R.*, 364; *Andrews agt. Clarke*, 3 *Bosw.*, 585; *Merwin agt. Hamilton*, 2 *Duer*, 244.)

(2.) The defendants hastily sold the plaintiff's stock, without making any demand, or calling on the plaintiff to redeem, or giving him time to do so, after the alleged fall of price, requiring further security to keep up the margin.

No communication of any sort came to the plaintiff from the defendants, after the alleged fall of price, until the report was made of sales of the whole.

The plaintiff was not bound to anticipate a fall of price, nor was he bound to increase his margin, until a fall actually had occurred, and until he, after such occurrence, had been called on to make the necessary increase of margin, or pay off the loans and redeem the stock. (*Andrews agt. Clarke*, 3 *Bosw.*, 585.)

(3.) The plaintiff complied with every duty on his part under the contract, and at all times kept up the required margin of \$10 a share.

While the shares stood in the market at 80, the margin was good according to the terms of the contract.

The contract was made January 11, 1867, and was to run sixty days, or till March 12th.

About January 20th, the stock declined below 80, and the defendants called on plaintiff for more margin, and he furnished \$20,000 in cash.

January 23d, on a like decline he added \$50,000 to the security.

January 24th, defendants called for more security, and plaintiff added \$25,000.

Later on the same day, January 24th, after business hours, defendants called for more, and plaintiff furnished \$20,494.

The plaintiff, at the close of that day, had the margin full and complete.

Later in that afternoon, he notified the defendants that he would take up 2,000 shares of the stock the next day, and pay the full price for it, i. e., \$140,000, and leave all the additional securities in the defendants' hands; which would provide for a further and large decline, if it should occur; and afterwards notified them that he would also take up further 3,000 shares, and pay for them (being \$210,000), or as much more as might be necessary if a decline took place, and leave all the additional security in their hands.

The plaintiff made arrangements accordingly, and the next morning sent to the

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defendants for the purpose of fulfilling what he said, and then obtained information from them that the stock had been sold already.

These statements of the complaint are confirmed and supported by Mr. Crane's affidavit of the circumstances.

The attempt of the defendants to show a sort of notice to the plaintiff through Mr. Bunker, whom they call his "confidential clerk" is wholly refuted by Mr. Bunker's affidavit and Mr. Durant's affidavit.

(4.) The plaintiff having informed the defendants late in the day, that he would the next day take a part of the pledged stock and pay off a corresponding part of the loan, he was entitled to a reasonable time to perform the transaction.

The defendants making no objection at the time, by their silence assented to the arrangement for the next day for the 2,000 shares; and if there should be a fall requiring the taking of the additional 3,000 shares, by the terms of the arrangement the defendants must let the plaintiff know their wishes and option.

The usage and custom gave the plaintiff most of the next day to perform the operation; and long before the time elapsed he was informed by the defendants of their sales being completed. The custom is well established.

(5.) The contract required additional security only when the "market price" should decline so as to reduce the margin below 10 per cent. Such "market price" is not determined by a few hurried sales made out of regular hours, but by regular sales on calls of the recognized boards, or at public auction. In this case no auction price is shown. The sales at the regular boards on the 25th of January were thus: Stock Exchange, first board, 60 to 61; second call on sale at 58½; second board, 64 to 64½, closing price 64½ to 65; open board, 10 A. M., 66 to 63½; 1 P. M., 62 to 63½; 3½ P. M., 63½ to 62½.

The "market price," therefore did not go so low on that day as to entitle the defendants to any more margins; and there was no show at all of such a fall of price before the defendants begun to sell under the pledge.

(6.) The defendants' report of sales was below the market price throughout. It shows no sale as high as 60, but gives several at 57, and one at 56½ and one at 56.

(7.) Many of the sales so reported were not sales of the plaintiff's shares, but of other shares, and some of the plaintiff's shares sold for more than is reported.

The plaintiff had not transferred his shares to the defendants on the company's books, but had lodged his certificates with powers of sale annexed, in the defendants' hands, and the plaintiff thus retained his property in the identical shares and certificates, and was entitled to a return of the same on the discharge of the loan. The defendants had no authority to mingle such certificates with other certificates or exchange them for other certificates. If the defendants would enforce the pledge by sale, they must sell the plaintiff's certificates; and if they made a sale of other certificates it cannot be reported as a sale of the plaintiff's pledge.

The case may be different where the shares of many proprietors are posted into one account on the stock ledger, and the broker has no means of distinguishing the shares of different customers. In the present there was no confusion of shares, but a clear and precise certainty of certificates. (*Saltus agt. Genin*, 3 *Bow.*, 240—257; *Horton agt. Morgan*, 6 *Duer*, 56; *Allen agt. Dykers*, 3 *Hill*, 593; *Nourse agt. Prime*, 4, *J. Ch. R.*, 499.)

III. The fact that in another action for different relief, but based upon a statement of facts similar in many respects, the supreme court dissolved an injunction, is no bar or defense to the proceedings now pending.

(1.) That suit has been discontinued.

(2.) The determination of a motion within the discretion of a court never controls the rights of parties when they appear in a different action or court.

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(3.) The erroneous decision of the motion by the supreme court grew out of the practice there established of refusing to hear affidavits in support of an injunction, when the defendant moves to dissolve it on a verified answer, without other affidavits.

This court holds the contrary rule. (*Fowler agt. Burns*, 7 *Bow.* 637; *Hoffman's Pro. Rem.* 351, 360, 361.)

The practice of this court prevails in all the districts of the supreme court except the first. (4 *Abb.* 282; 8 *Barb.* 17; 1 *Code R.* 114; 4 *How.* 225; 5 *How.* 265.)

The Code clearly treats the sworn answer as an affidavit, because, if it were not so considered, it could not be used as ground of the motion. (*Code*, §§ 220, 222, 226.)

IV. It being impracticable in the present case to decide, on a non-enumerated motion, upon affidavits, all the issues joined by the pleadings; and the court at chambers, on full hearing, having increased the security and continued the injunction until trial; and the dissolution of the injunction being fatal in the right of the plaintiff to reclaim his shares, if he succeeds on the trial; and the cause being already referred for trial; the order appealed from should be affirmed. (*Carpenter agt. Danforth*, 19 *Abb.* 225.)

By the court, ROBERTSON, Ch. J. The professed object of this action is to redeem certain securities in the hands of the defendants, upon paying the amount due thereon, and as incidental thereto, to obtain an order restraining the defendants from selling such securities until an account can be taken of the amount due the defendants. It is essentially, therefore, an equitable action, and must be governed by the well settled rules of equity jurisdiction; and if it cannot be maintained under those rules, the injunction order appealed from cannot stand.

A court of equity has no general jurisdiction over actions to redeem personal property pawned, without some other circumstances rendering its interference necessary. (*Glennie agt. Irwin*, 3 *You. & Coll.* 436; *Hirst agt. Peirse*, 4 *Price*, 339; *Jones agt. Smith*, 2 *Ves. Jr.* 272; *Demenbray agt. Metcalf*, 1 *Vern.* 698.)

The remedy at law is ample, by tender of the amount due and a possessory action to recover the articles pledged, or damages for their detention. (2 *Story Eq. Jur.* § 1032.) It is true, as laid down in *Hart agt. Ten Eyck* (2 *Johns. Ch. R.* 100), that bills to redeem pawned personal property have been sustained, but only in cases where either no objection has been made, or an equity arose out of other circumstances,

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and all the cases cited in the last case as authority are of that kind. (*Kemp* agt. *Westbrook*, 1 *Ves.* 278; *Demenbray* agt. *Metcalf*, *Prec. in Ch.* 194; *S. C.* 2 *Vern.* 698; *Van Dersee* agt. *Willis*, 3 *Bro.* 21. Certainly such an action would not spring out of any of the great sources of equitable jurisdiction.

The only ground of equitable jurisdiction over an action for the redemption of personal property pledged, besides the necessity of a discovery, and perhaps an assignment of the pledge, is the necessity of taking an account. (2 *Story Eq.* 1032, and cases cited in note.) It is of course not necessary to discuss how far the union of both legal and equitable jurisdictions in one court, and the right conferred on either party to an action to examine the other party as a witness (*Code of Procedure*, § 389), has taken away a jurisdiction dependent solely on the right of discovery, as there is no pretence in the complaint or elsewhere of the necessity of any such discovery. There remains, therefore, in this case, but the ground of some necessity of an account being taken, as in a court of equity, to enable the plaintiff to sustain his action.

It is fully settled that the *account* on which equity bases its jurisdiction must be really one; that is, not having only one item on one side and a number of set offs on the other, but a series of transactions on both sides. (1 *Story Eq. Jur.* §§ 458, 459; *Porter* agt. *Spencer*, 2 *Johns. Ch. R.* 171; *Moses* agt. *Lewis*, 12 *Price R.* 502; *King* agt. *Rossett*, 2 *Y. & Jer.* 33; *Dimwiddie* agt. *Bailey*, 6 *Ves.* 136, and *Wills* agt. *Cooper*, cited therein; *Padwick* agt. *Hurst*, 16 *Beav.* 575; *Phillips* agt. *Phillips*, 9 *How.* 471.) In this case, the claim on the part of the defendants can only consist of one item, to wit., the original advances by them, or so much of it as remains unpaid. Every sum paid or to be credited in that account, set out in the complaint, forms a subject of set off in an action at law, including even any liability of the defendants for selling any of the originally pledged stock

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below its market price; for that is a subject of counter claim, in an action for the loan, under the first subdivision of section 150 of the Code of Procedure, as either *arising out of the contract or transaction which would be the foundation of such action, or connected with the subject of the action*, and as available in the court acting as a court of law as one of equity.

There is perhaps still less reason at this time for preserving, or rather extending, jurisdiction, to give affirmative relief to a debtor in such a case of a one sided account, since the enlargement by the Code of the cases in which references of all the issues may be ordered, wherever a long account is concerned, the increase of the power of all courts to order the production of books and papers summarily, and the conferring upon every suitor of the right of examining the adverse party as a witness, whatever the case may be.

So far from any discovery by the defendants being shown to be required, the plaintiff sets forth in his complaint various defects in the sale of the stock originally pledged, not merely as derived from the information of others, but as matters of his own knowledge, although he escapes all responsibility for the statements by not verifying them under his own oath. They are as follows: An entire failure to sell some shares of stock represented by the defendants in their report to the plaintiff of sales to have been sold, and sales of some at less than the market rate, and of others at higher prices than those stated in such report. He does not, however, as he was bound to do, in order to render his complaint sufficiently definite and certain, state the numbers of such unsold shares, or of those sold too low, or those whose prices are not properly accounted for. In the affidavits, however, presented on his behalf, he establishes what he considers to be such amounts, without the aid of any discovery from the defendants in regard to them.

Even assuming, however, that a court of equity will restrain the sale of pawned personal property until an

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account can be taken of the amount due on the loan upon them, under the same circumstances as it would a suit at law, the validity of the sale by the defendants of the stock in this case originally pledged is not one of such circumstances. If the sale was valid, the account to be taken is reduced to the original loan on one side, and on the other, the payment of two sums of \$20,000, and \$10,000 before, and the receipt of interest on the land grant bonds collected, less the government tax (\$33.25), and the amount of a note for \$25,000, since the commencement of this action.

To ascertain the amount due would in such case be a matter of mere clerical computation. If, however, one of the objects of this action be to attack such sale, and endeavor to make the defendants liable in damages for the conversion of such stock without authority, they could not, until liquidated in an action, form any part of an account, such as is prayed for in this case. Nor would the court be authorized to tie up the defendants from using their legal authority as pledgees, bestowed on them by the plaintiff, until the amount of such damages could be ascertained.

I shall therefore dismiss from consideration all the allegations in the complaint, and all the evidence before us, tending to establish any invalidity in such sale, as wholly superfluous and irrelevant, if not suicidal, in determining whether this action can be maintained upon such a basis as to warrant an injunction. The complaint does not clearly and distinctly either avow or disavow such sales as being made by authority, although it apparently does the former by claiming that, in the account which the plaintiff professes therein his readiness to have taken, that the defendants shall be charged with the market price of the stock sold, and the full amount received by them therefor, and not allowed the benefit of any pretended sales of stock; notwithstanding it also prays that the defendants may be charged in an accounting with all loss suffered by the plaintiff by the *unlawful* disposition of such stock. It might with equal propriety have

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sought that damages for selling any other stock without authority should enter into such account. Indeed, the only grounds suggested for attacking the validity of such sales were that the market had not so fallen as to create the contingency on which the right of sale arose, and that no demand was made for further *margin*.

In regard to the first, the evidence as to a fall on the 25th of January, the day of sale, is not conflicting; and in regard to the last, the contract before us does not require such demand to be made as was required by that in *Milliken* agt. *Dehon* (27 N. Y. R. 364), which case in fact rather holds a demand for the amount due not to be necessary, when a right is given to sell either at public or private sale, which *a fortiori* is applicable to this case, where a right of notice is expressly waived. The reasoning of Justices WRIGHT and MARVIN, in the case last referred to (*Milliken* agt. *Dehon*, pp. 370, 374), in regard to the impracticability of notice of time and place of sale of articles of such rapidly fluctuating value as stocks, is equally applicable to a demand of payment or more security, which seems to have been *purposely omitted* in this contract. At all events, unliquidated damages for an entirely unauthorized sale can form no part of an account to give jurisdiction to a court of equity.

Of course, the plaintiff is entitled to the benefit of any originally pledged stock which remains unsold, notwithstanding the written report of the defendants to him to the contrary. But I am at a loss to know how any failure to sell it would aid him in a mere *accounting* between him and the defendants to be had in this action. Such an *account* would not be affected except by the receipt by the defendants of some sum as the proceeds of an authorized sale of shares of stock. If they were not sold, the debt of the plaintiff would be so much the larger. A mere representation by an account of sales, that stock had been sold, when it was not, would by itself furnish no ground of equitable interference. The plaintiff claims to have

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detected the falsehood, and furnished in the affidavits before us evidence of it, without the necessity of an examination of the defendants. That evidence, if important, would be equally available in a trial at law, and no mere discovery would ever have been necessary.

Sales of the stock below the market price, when duly authorized, would not make the defendants liable for the difference, unless made with intent to injure the plaintiff beyond the mere realization of the amount due the defendants, as in other cases of abuse of lawful authority. (*King* agt. *Parks*, 19 *J. R.* 375; *Butts* agt. *Edwards*, 2 *Denio*, 164; *Baldwin* agt. *Weed*, 17 *Wend.* 224.) But something besides a mere sale below the market price is necessary to show such intent.

The defendants are mere pawnees, were not bound to use even the same diligence as an agent to obtain the best price. The latter would not be held liable except for extraordinary negligence, which must be proved, not presumed. There must, at least, be such recklessness shown in the mode or time of selling as to establish an intent to injure the pawnors, before the pawnees can be made liable for any loss. The complaint, indeed, avers that the sales below the market price were made by the defendants "out of the usual course of business, and in a manner *designed and intended to depress the price and produce less than the market value*, and which tended to and did produce that result." But the only verification that allegation has is an affidavit by the agent of the plaintiff (*Crane*), that he believes such matters to be true, from having seen reports of sales at the stock exchange and board of brokers of that day, and been informed by persons named as purchasers in the report of sales rendered by defendants of prices paid by them, and the numbers on the certificates of stock received by them. This certainly is not sufficient to establish a design to obtain a less price than the market value, either to injure the plaintiff by such sales or for any other purpose. Such allegations in the complaint

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are fully denied by the defendants in their answer, verified by their oath; and there is no other evidence before us of any such intent or its result in such sales. On the contrary, the agents of the defendants in selling deny it. Consequently such allegations in the complaint, so verified and denied, furnish no ground for continuing the order of injunction in this case.

The remaining objection in the complaint to the account rendered by the defendants of the sales by them of the originally pledged stock, of the receipt of larger sums as the prices of some of them than those stated in such account, the plaintiff claims to have discovered by other means and sustained by ample evidence before us, without any discovery from the defendants. If so, the details are all given in the affidavits furnished on his part, and there would be no difficulty in establishing the set off by way of defense, in an action at law, to the full extent of the sums kept back.

The whole account between the parties, to be taken in this case, upon the plaintiff's own showing, will be reduced to the original advance by the defendants on one side, and on the other cash payments made by the plaintiff, interest on the land grant bonds and amount of the Pacific Company's note, received by the defendants, and the price of the shares of the originally pledged stock actually sold by them, omitting from such account (for reasons already given) all excess of the market value beyond such price, and all sums pretended by the defendants to have been received by them in any of the sales claimed by the plaintiff to be fictitious (if there were any such). So simple an account, requiring mere computation of figures, is not of such a character as to require the aid of the equitable powers of the court to unravel it. Nor should the defendants be delayed in using the means placed in their hands by the plaintiff to collect the amount due them, according to the plaintiff's contract, until this action is reached on the calendar, to be tried, or a referee can be called in to make the computation, and a

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decree made for redemption, which the plaintiff may perform or not, as he pleases.

Were it necessary, in order to justify a vacation of the injunction order in this case, to go beyond the questions of the jurisdiction of this court to sustain this as an equitable action, and the incompatibility of the nature of the account to be had under any state of facts shown by the plaintiff, with any necessity warranting the exercise of such jurisdiction, a further justification would be found in the denial in the answer of the equities of the complaint, and in the affidavits of the brokers of the defendants, who actually sold the preferred stock, as opposed to that of the plaintiff's agent (Crane), who testifies solely to information derived from the purchasers. *Prima facie*, the denial in the answers of the defendants of the equities of the complaint ought to entitle them to a vacation of an injunction order (*Blatchford* agt. *N. H. R. R. Co.* 5 *Abb.* 276); but the affidavits on the part of the plaintiff being admitted, those on the part of the defendants rebutted their effect. The plaintiff was undoubtedly bound to make out his case affirmatively, and although this court on appeal at general term cannot properly interfere with any decision at special term, founded on conflicting evidence, it yet may do so where that on one side is mere information and belief, and that on the other positive knowledge. The apparent discrepancies of the affidavits of some of the witnesses on the part of the defendants, when made in the action in the supreme court, seems to be explained by them. There is also some discrepancy in the testimony of the witnesses as to the market value of the stock in question on the day it was sold, but that may originate in their knowledge of different sales, and is not sufficient to warrant the conclusion of an undue sacrifice of it by the defendants for sinister purposes. The testimony of the defendants' brokers (*Towars, Kohn, Minzesheimer* and *Ellery*) is positive as to the sales of stock by the direction of the defendants, and the prices obtained therefor, which correspond with the account

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rendered by the latter to the plaintiff. The defendants swear that all sales made of such stock by such brokers for them, before a quarter before twelve o'clock, noon, were not made on behalf of the plaintiff; and the plaintiff's agent (Crane) is made to testify whether some of the sales made at a higher rate than was reported by the defendants was of the plaintiff's stock. Upon such evidence, the plaintiff has hardly made out a clear case of sales at higher prices, or of any design by the defendants to lower the market value; and the mere fact of reporting fictitious sales is not sufficient to sustain the injunction order.

I am inclined to think, if material in this case, that the plaintiff is not bound in it by the decision of the case in another court between the same parties, upon a similar state of facts. In that, the plaintiff claimed an illegal sale of the stock, and demanded its restoration in *specie*, by way of an equitable substitute for the remedies formerly known as actions of trover, detinue or replevin. An injunction was of course properly refused in it. The plaintiff subsequently discontinued that action, and attempted one of claim and delivery upon the same ground of an illegal sale, and finally abandoning that ground, has chosen this one in its present form for an accounting, recognizing all the sales actually made as valid, but claiming more as to the sales of some than the defendants are willing to admit. By this action he has succeeded, by giving security instead of making a tender, and paying the money into court, or bringing a possessory action, in obtaining delay by an injunction order. It may possibly be hard upon the plaintiff to be driven to an action for damages, or for his stock, or, perhaps, rather more convenient, to abide the delay of a suit, before paying the amount due on the original loan; but that should have been considered when he made so stringent a contract, giving the defendants so much authority. The individual hardship, however, is not to be weighed against the danger of the

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abandonment of well settled legal principles, as to the only cases in which such hardship can be relieved from.

The order appealed from should be reversed, and the order enjoining the defendants vacated, with \$10 as costs of the motion to vacate it.

No costs are given on the appeal.

UNITED STATES DISTRICT COURT.

In the Matter of ALEXANDER FREAR, a Bankrupt.

Where one who was a member of a late firm files his individual petition in bankruptcy, all his creditors can prove their claims, whether individual or partnership. Partnership assets must be administered according to the 36th section of the bankrupt act, and so must the assets of the separate estate of the bankrupt.

Southern District of New York, 1868.

I, John Fitch, one of the registers of said court in bankruptcy, do hereby certify that, in the course of the proceedings in said cause before me, the following question arose pertinent to the said proceedings, and was stated and agreed to by the counsel for the opposing parties, to wit.: Brown, Hall & Vanderpoel, for the bankrupt; Martin & Smith, for Bauendahl & Co.; Matthews & Betts, Chapman, Scott & Crowell, and S. T. Freeman, for various creditors; also, Richard J. McCurdy in person, and for Aldrich, McCurdy & Co.

I deem it the duty of the register, in deciding questions involving the construction of the bankrupt act, to examine the question presented in all its bearings; examine the authorities applicable to the case, and give an opinion in the matter upon the law of the case, which will enable the district judge to decide the case by reversing or affirming the opinion of the register. This course lessens the arduous duties of the district judge, and relieves him of some of the most difficult and laborious part of his duties.

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On the 19th day of February, A. D., 1868, the above named petitioner filed his individual petition in the prescribed form (No. 1), praying that he might be adjudged by the court to be a bankrupt, and have a discharge from all his debts provable under the bankruptcy act. There is no reference in the petition to co-partnership debts, but the schedules annexed show the petitioner was a member of the late co-partnership firm of Alexander Frear & Co., which was dissolved more than six months prior to the filing of said petition, and a large number of debts contracted by said co-partnership are set forth in said schedules, including the debt to Bauendahl & Co., and the other creditors who have proved their claims.

The petitioner has been duly adjudged a bankrupt, and at the meeting of creditors, Bauendahl & Co. presented against the estate of said petitioner proof of a debt which was contracted by the said firm of Alexander Frear & Co.; to this the attorney for the petitioner objected, upon the ground that co-partnership debts could not be proved herein, and urged that the indebtedness sought to be proved was a debt of the said firm of Alexander Frear & Co., and not his (the petitioner's) debt, within the meaning of the bankrupt act.

The attorney for said Bauendahl & Co. insisted that the fact that others were liable with the petitioner on this debt made no difference; that the co-partnership of Alexander Frear & Co. being dissolved, the debt was the joint and several debt of the persons who composed said co-partnership; that the creditor could enforce its collection from the individual property of the petitioner; and that proof of it should be received, and that a creditor has a right to prove the same.

The following question of law arises thereon:

Where a person who was a member of a late co-partnership files his individual petition under the bankrupt act, praying for a certificate of discharge from all his debts, can all his creditors prove their claims against him, or are his

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individual creditors alone entitled to come in and prove their claims?

Section 19 of the bankrupt act, approved March 2, 1867, allows a party to prove any debt he may have against a petitioner; but the proof of the claim or debt does not by any means conclude the petitioner or any of the petitioner's creditors—he or they may contest the claim so proved upon any legal ground authorized by law. The act expressly allows the petitioner to object to all debts barred by the statute of limitations; yet such a claim, if proved, and not objected to by the petitioner or a creditor, must be allowed by the court, and the assignee must receive it as a claim entitled to its share of the dividend. The same rule applies to a debt which by a state law may have been discharged by a state insolvent law, which, as between the citizens of the same state, is binding and effectual in the state courts, and also United States courts, but not as between citizens of different states. (3 *Selden*, 300; *Kelly* agt. *Drury*, 9 *Allen*; *Baldwin* agt. *The Bank of Newburgh*, 1 *Wallace*, 234, at p. 239; *Worthington* agt. *Jerome*, Justice NELSON, *Manuscript case*.)

My view of the case is this, that any claim that the creditor could prosecute and recover as against the petitioner, in a suit in the district court, can be proved and must be allowed in the proceedings in bankruptcy, as the law makes the proceedings a suit of the debtor against his creditors, merely reversing the manner of proceedings. This brings up the question, could the creditor sue for and recover in the district or circuit court the debt or demand he now seeks to maintain against the objection of the petitioner? It must be allowed as the same rule of law in regard to the debts that can be allowed in bankruptcy must govern at the circuit; as I conceive it to be plain that, if the claimant could not obtain a judgment upon the claim, he cannot participate in the proceeds of the petitioner's estate.

By the law of this state, a partner is liable personally for

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the debts of the co-partnership to the entire indebtedness of the firm; the debt of the firm is as much the debt of the individual as of the firm; and after the property of the firm or corporation is exhausted, and there still remain claims or debts unsatisfied, the individual property of the members of the firm or co-partnership can be taken in execution to pay the firm debts. Therefore, I hold that debts due by a firm are so far the debts of each member of the firm that any creditor of the firm can prove their debts due them from the co-partnership as against any member of the firm, whether he petition as an individual or as a member of a firm, or of a late firm; the petitioner is liable both as an individual and as a co-partner; is jointly as well as severally liable upon a contract, whether made as an individual or as a member of a firm.

The discharge of the petitioner would not in any manner affect the claim of the creditor against the members of the co-partnership, their claim against the others would remain the same; but should there be any money paid upon their claim, it would reduce the amount due upon the debt the amount so paid; the bankrupt would be discharged from the debt. It operates the same as the death of a bankrupt with no estate.

The ground taken by Brown, Hall & Vanderpoel, for the bankrupt, would not only defeat the intent of the framers of the bankrupt law, but would render the discharge of the petitioner worthless, as he would remain indebted upon all the co-partnership debts, which constitute most of his indebtedness; also renders most of the discharges in this district already granted worthless, and laying the foundation for endless litigation.

The bankrupt law is analogous to the insolvent law of this state, known as the two-third act. By that act a discharge cuts off all debts, co-partnership as well as individual. The supreme court, in the wording of the form of the petition, evidently intended that the petitioner should be discharged

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from all his debts, individual as well as otherwise. The provisions of the bankrupt law contemplate the entire discharge of the petitioner; no reservations are made, no partial discharge provided for. All claims of whatever nature are provable, whenever an action at law or in equity could be maintained against a petitioner. The claim upon which said action could be maintained can also be proved, subject to the same defense as in a court of law.

By section 4 of the bankrupt act, the register is empowered to take proof of debts, "and all" depositions of persons and witnesses taken before said register shall be reduced to writing, be signed by him, and filed in the clerk's office of the district court, as part of the proceedings. (§ 5, *Bankrupt Act*.)

By section 8 of the bankrupt act, "and any creditor whose claim is wholly or in part rejected may appeal, &c."

By section 11 of the bankrupt act, the petitioner, in his petition, must state his "willingness to surrender all his assets for the benefit of his creditors." His schedule must contain a full and true statement of all his creditors. Why require this to be done, unless his creditors could prove their debts against his estate? The "sum due each creditor, also the nature of each debt or demand," must be stated. Is it probable that congress would have required the petitioner to set forth the name of each creditor, the amount and consideration of each debt, unless the holder and owner of the debt could prove the same and share in the proceeds of the estate? "also to annex an inventory of all his assets, both real and personal?" The estate of a petitioner may consist of every imaginable piece of property, held jointly with others, and his interest therein must be taken by the assignee.

All debts due by the petitioner may be proved, and he will be discharged from them, be they individual or co-partnership debts.

By section 13, bankrupt act, a creditor who has proved

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his claim may request the judge to require the assignee to give bond, &c.

Section 14, bankrupt act, vests in the assignee all the bankrupt's property, including co-partnership effects. By section 14 of bankrupt act, the petitioner is compelled to make a transfer to the assignee of his assets, and any interest in any co-partnership is an asset.

If an attachment should have been issued against the property of the petitioner, and a levy made upon the property of the petitioner, and that property have been an interest in a co-partnership, such attachment, if made within six months, would be set aside and the assignee in bankruptcy would take the effects, be they co-partnership or otherwise.

For the reasons above given, and upon a careful review of the law applicable to this case, I hold that the debt was provable, and allowed the claim to be proved as a debt against the estate of the bankrupt. Brown, Hall & Vanderpoel, attorneys for the petitioner, objected, and asked that the same should be certified to his honor the district judge.

JOHN FITCH, *Register*.

BLATCHFORD, J. The debt in question is provable, whether there are any assets of the co-partnership or not. If there are any such assets, they must be administered according to the provisions of section 36 of the act, and so must the assets of the separate estate of the bankrupt.

The clerk will certify this decision to the register, John Fitch, Esquire.

SUPREME COURT.

In the Matter of the Application of THE COMMISSIONERS of THE CENTRAL PARK, for and in behalf of THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, relative to laying a road or public drive between the northerly line of Fifty-ninth street and the southerly line of One Hundred and Fifty-fifth street, in said city.

The act of 1865, so far as it authorizes the *commissioners of the Central Park*, instead of the common council of the city of New York, to make an application to this court for the *opening of a road or public drive* above Fifty-ninth street, is *not unconstitutional*, whatever may be considered as to the validity of some other portions of that act.

The authority conferred on the commissioners to make such application is not that of any *local officer*, nor does it authorize them to discharge the duties of any *office*, but provides for the discharge of a mere ministerial act.

The common council of the city of New York never had authority, since 1807, to lay out any streets or public places in that part of the city which was embraced in the map of the commissioners filed under the act of 1807. Their power was below the limits embraced in that map.

The act of 1813 expressly limited their powers to that part of the city not laid out by virtue of the act of 1807. They had no authority to lay out or open any streets or public places but such as were provided for on the said map.

The authority conferred by the legislature upon the commissioners of the Central Park, to make application to lay out a road or public drive between the northerly line of Fifty-ninth street and the southerly line of One Hundred and Fifty-fifth street, did not in any way interfere with the authority previously bestowed upon the common council.

The legislature might have laid out this drive mentioned in the act, and having the power, they might authorize others to do it.

A mere error of judgment of the commissioners in the valuation of property taken for such purpose is not the subject of review on a motion to confirm their report, unless the sum allowed was grossly inadequate and unequal as compared with other valuations, or unless some wrong principle was adopted as to the amount allowed.

This act of 1865 does not authorize the taking of any land by the commissioners not required for the drive or road, which the act provides shall be of an uniform width, and is described in the notice required to be given by the commissioners as follows: "Said road or public drive is of a general width of one hundred and fifty-feet, as shown on a certain map," &c.

Held, therefore, that the commissioners had no jurisdiction to take gores of land outside of said road or drive, and so far as such gores are included in these proceedings, they are erroneously taken.

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First Judicial District, June, 1868.

Hon. GEORGE G. BARNARD, P. J.; Hon. JOSIAH SUTHERLAND, Hon. DANIEL P. INGRAHAM, Justices.

MOTION to confirm the report of the commissioners appointed to acquire land for the widening and laying out of the Bloomingdale road, or Broadway, between Fifty-ninth and One Hundred and Fifty-fifth streets, in the city of New York, the road to be of a general width of one hundred and fifty feet.

*RICHARD O'GORMAN, corporation counsel, and
WILLIAM FULLERTON, for the motion.*

ABRAHAM R. LAWRENCE, JR., for the objector Rudolph A. Witthaus, presented the following points, in opposition to the confirmation:

First. The act of April 24, 1865, entitled "An act to provide for the laying out and improving of certain portions of the city and county of New York," under which the proceedings herein were initiated, and the commissioners of estimate and assessment herein were appointed, is in conflict with the second section of the tenth article of the constitution of this state, because it takes away from the mayor, aldermen and commonalty of the city of New York, and the officers of said corporation, the power of determining the location, width and extent of a public road or drive in said city, and of the other streets, roads, squares and places in said act mentioned, and of laying out the same, and of acquiring title thereto, and transfers the same to the commissioners of the Central Park, which said commissioners are officers who are not elected by the electors of the said city or county, nor appointed by the authorities thereof. (*Laws of 1865, p. 1136. See, as to the appointment of the Central Park Commissioners, Laws of 1857, vol. 2, p. 715; Laws of 1859, p. 857; Laws of 1861, p. 164; Laws of 1866, vol. 1, p. 822, § 8.*)

(a.) The second section of the tenth article of the constitution reads as follows:

"§ 2. All county officers whose election or appointment is not provided for by this constitution shall be elected by the electors of the respective counties, or appointed by the boards of supervisors or other county authorities, as the legislature shall direct.

"All city, town and village officers, whose election or appointment is not provided for by this constitution, shall be elected by the electors of such cities, towns and villages, or of some division thereof, or appointed by such authorities thereof as the legislature shall designate for that purpose.

"All other officers whose election or appointment is not provided for by this constitution, and all officers whose offices may hereafter be created by law, shall be elected by the people or appointed as the legislature may direct."

(b.) It was decided in the case of *The People ex rel. Wood agt. Draper* (15 N. Y. R. 532). that the above section, so far as it limits the power of appointment, or the elec-

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tion of city or county officers to the authorities of the city or county, or to the electors thereof, only applied to city and county officers in existence at the time of the adoption of the constitution of 1846.

But it was also held in that case that it was not enough to take a case out of the provisions of the above section that the *names of officers existing when the constitution was adopted, were afterwards changed by an act of the legislature, or their functions colorably modified*. That the constitution regarded substance not-form. (*Per DENIO, C. J. 539; See also People agt. Raymond, Ms.*)

(c.) This objector insists that the powers and duties which, by the act of 1865, before referred to, are sought to be vested in the commissioners of the Central Park were, at the time of the adoption of the constitution of 1846, confided to the mayor, aldermen and commonalty of the city of New York, and to the officers of said corporation.

The 177th section of the act of April 9, 1813, entitled "an act to reduce several laws relating particularly to the city of New York into one act," after providing that the mayor, aldermen and commonalty may take proceedings to have the streets, roads, &c., opened, *which were laid out by the commissioners of streets and roads, appointed under the act of 1807*, goes on to provide as follows:

"And whenever and as often as it shall, in the opinion of the said mayor, aldermen and commonalty, in common council convened, be necessary or desirable for the public convenience or health, *to lay out, form and open any street or streets or public place or places in any part of the said city not laid out into streets, squares and public places by the commissioners of streets and roads in the city of New York, under and by virtue of the act aforesaid*, or to extend, enlarge, straighten, alter, or otherwise improve any street or streets, or part of a street, or public place or places already laid out or hereafter to be laid out and formed or opened in any part of the said city not laid out into streets, avenues, squares and public places by the commissioners aforesaid, *it shall be lawful for the said mayor, aldermen and commonalty of the city of New York to order and direct the same to be done, and to cause the same to be done accordingly in such manner as they shall think most advisable.*" (*See Act of 1813, § 177; Davies' Laws, 528; See also Davies' Laws, 534.*)

This objector contends that the transfer of these powers to the commissioners of the Central Park, under the construction given by the court of appeals, in the case of the *People agt. Draper (supra)*, and in other cases which have followed that case, to the section of the constitution above referred to, is not within the powers of the legislature.

He does not deny that it would be competent for the legislature to transfer the powers in question to other officers than the mayor, aldermen and commonalty of the city of New York, but insists that the officers to whom such transfer is made, must be either elected by the electors of the city or appointed by the local authorities.

The powers sought to be given to the commissioners of the Central Park were, prior to 1846, exercised solely by local officers, and the case falls precisely within the provisions of the constitution relative to local officers. (*People agt. Draper, 15 N. Y. R. 532; People agt. Raymond, Court of Appeals, March Term.*)

Second. Even assuming that the legislature had the constitutional power to confer upon the commissioners of the Central Park the authority given to said commissioners by the act of 1865, the objector contends that the said commissioners had no right, *in this proceeding*, to take the property belonging to him, which is shown upon the diagram annexed to the objections filed by him.

(a.) It will be perceived, by reference to the first section of the act of 1865, that the powers of the commissioners of the Central Park, as to laying out "*public squares and places*," are limited to that part of the city of New York which is north-

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ward of the southerly line of One Hundred and Fifty-fifth street. Below One Hundred and Fifty-fifth street, they have power, under that act, to lay out a road or drive, not a public square or place. Now, the triangular piece of property belonging to the objector in no just sense can be said to be a part of the road or drive laid out by the commissioners.

It will be a public place, but not a road or drive.

Although, then, the commissioners may have since acquired the right to acquire lands for public places, this proceeding being based on the act of 1865, and taken *for the opening of the road mentioned in that act*, the powers of the commissioners must be determined by that act.

If it should be said that under the act of 1865, the commissioners have a discretionary power to determine the location, width, courses, windings and grades of such road, &c., the answer is, that it must clearly appear that there has been something like a reasonable exercise of that power; and that, under the pretence of laying out a road or drive, the laying out of squares and public places cannot be accomplished. The two powers are distinct and separate. (*Laws of 1865, 1136; Sharp agt. Spier, 4 Hill, 76; Sharp agt. Johnson, 4 Hill, 92.*)

Third. Under the provisions of the first section of the act entitled "an act to prevent fraud in the opening and laying out of streets and avenues in the city of New York," passed April 24, 1862, the commissioners of estimate and assessment are required to complete their proceedings within four months from the time of their appointment, unless further time is allowed for that purpose by the supreme court. (*Laws of 1862, 967; Laws of 1865, 1138.*)

Fourth. The award made by the commissioners of estimate and assessment for the property of this objector is grossly inadequate, and far below the actual value of the same.

(a.) The affidavits presented on the part of the objector make it quite apparent that the sum of \$24,000, the amount finally allowed by the commissioners for the property in question, does not approximate to the value of such property.

These affidavits are seven in number, and are made by men who have had the amplest experience in sales of real estate in and about the vicinity of the property in question, and, in fact, all over New York.

1st. Mr. Loomis, who is, and who for the last fifteen years past has been, an agent and broker engaged in the business of negotiating the sale and purchase of real estate, both in the vicinity of this property and elsewhere in the city, places the value of the same at \$60,000, or \$36,000 more than has been allowed by the commissioners.

2d. Mr. Kendall, who has been engaged for twenty years past in the business of negotiating the sale and purchase of real estate in every part and section of the city, and who is well acquainted with the property of the objector, values it at \$50,000.

3d. Mr. John McClave, a very well known real estate man, values the property at \$50,000.

4th. Mr. James M. Miller, for thirty-six years past an auctioneer of real estate in this city, a man of the greatest possible experience in such matters, who is well acquainted with the property, values it at \$50,000.

5th. Mr. William H. Raynor, who has been a real estate broker in this city for twenty-five years, values the property at \$45,000.

6th. Mr. Daniel F. Tiemann, a resident of the city for upwards of sixty years, and who is very familiar with the value of real estate in the upper part of the Island of New York, values the property at \$45,000.

7th. Mr. William R. Stewart, a resident of the city for upwards of thirty years, values the property at \$45,000.

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8th. There is also the objector's own affidavit attached to the objections, that the property is worth at least \$60,000; but, as he is interested, under the rule applicable in these cases, his affidavit cannot probably be taken into consideration as regards value.

Fifth. The commissioners have, however, awarded to the objector \$21,000 less than the lowest valuation specified in any of the above affidavits.

The objector submits that with such affidavits before the court, he brings his case within the rule allowing the court to send back a report when it is strongly against the weight of evidence.

It is not of course known to the objector, nor can it be until this case is actually argued, whether any, and if so, what, or how many affidavits will be presented by the commissioners to sustain their report; but he confidently submits that whether such affidavits are few or numerous, the experience, character and reputation of the men who have made affidavits in support of his objections, justifies him in asking the court to weigh well those affidavits, and not to sustain the commissioners in awarding him a sum which is but little more than one-half of the lowest amount specified in those affidavits as the value of his land.

Sixth. But the commissioners have erred in the principle upon which they have acted in arriving at the value of the objector's land; and on that ground he asks that the report may be sent back to them.

Their error consists in this: They have not taken into account the fact that the land of the objector is all front, and have allowed to him no more per square foot than they have awarded for other lands having only one or two fronts.

For the piece of land on the north-westerly corner of Broadway and Seventy-second street, containing only 2,100 square feet, and with only a front on Seventy-second street and Broadway, they have allowed \$14,049, or at the rate of \$6.70 per square foot, while for the property of the objector they have allowed but \$24,000, or less than \$6 per square foot.

For the piece of land on the south-westerly corner of Seventy-second street and Broadway, containing 1,840 square feet, the commissioners have allowed \$12,649, or at the rate of \$6.90 per square foot.

For the piece of land on the north-east corner of Seventy-first street and Tenth avenue, containing 1,930 square feet, the commissioners have allowed \$14,087, or at the rate of \$7.30 per square foot.

For the piece of land on the south-east corner of Sixtieth street and Broadway, containing 1,600 square feet, the commissioners have allowed \$20,000, or at the rate of \$12.50 per square foot.

For the piece of land on the south-west corner of Sixtieth street and Broadway, containing 2,300 square feet, \$33,000, or at the rate of \$14.35 per square foot.

To the objector, whose piece of land contains 4,150 square feet and fronts on Broadway, the Tenth avenue, and Seventy-third street, and runs to a point facing Seventy-second street, with three full fronts (and it may be said, including the point near Seventy-second street, with four fronts), the commissioners have actually awarded less per foot than to the owners of the property above specified.

There certainly can be no principle upon which this discrimination is made against the objector.

For any error in the principle of valuations it is well settled that the report of the commissioners will be recommitted to them. (*Matter of Furman Street*, 17 Wend. 650.)

Seventh. The commissioners, in making their award to the objector, have evidently overlooked the fact that the entire property of the objector is taken for the proposed improvement, and that no residue is left to him to be benefitted by the improvement.

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The owners of the parcels above referred to, who have received greater proportionate awards than the objector, have a residuum remaining which is much enhanced in value. Yet no allowance has been made for this fact by the commissioners.

Eighth. Again, the taking away of the objector's property has proportionately increased the value of the adjacent lots on the Tenth avenue, and it is submitted that a portion of that increase should be credited to the objector in making his award.

Ninth. The objector, in conclusion, does not deny the well settled principle that the determination of the commissioners is entitled to great weight upon a mere question of value; but he confidently insists that, where the difference between the valuation of the commissioners and of the witnesses for the owner is so great, he is entitled to the benefit of every doubt which the court may have as to the justice of the award. He does insist that it is clear that in this case there has been an error in principle committed by the commissioners in making the award to him; and he therefore asks that the report made be remitted to the commissioners, for the purpose of revision and correction.

IRA SHAFER, for objectors *Campion, Clark and Grove*, relied upon the constitutional points presented by the counsel for Witthaus, and objected to the awards made by the commissioners as inadequate.

Mr. O'GORMAN, in reply to the contestants:

I. As to the objections of Rudolph A. Witthaus:

(a.) It is objected that the act of April 24, 1865 (*ch. 565 Laws 1865*), under which these proceedings have been brought, violates section 2, article 10, of the constitution of this state.

This question was raised and determined in *The Matter of the Central Park*, reported 16 *Abb. Pr. R.* 56.

In that case and the case at bar the objection was the same, urged by the same counsel, and overruled by Judge INGRAHAM, who now occupies a seat at the general term. (*See points of counsel and opinion of court*, 16 *Abb.* 56.)

II. The duties devolving on the commissioners of the Central Park, under chapter 565, laws 1865, never did devolve on the mayor, aldermen and commonalty of the city of New York, under the laws of 9th April, 1813, and were not imposed on them at the time of the adoption of the constitution of 1846.

The 177th section of that act, cited by counsel for Witthaus, empowers the mayor, &c., to open streets which *had been laid out* by the commissioners appointed under the act of 1807, and also to *lay out* and open any street or public place in any part of the city *not* laid out in streets, &c., under said act of 1807.

But there is no part of the city above Fourth street which was not laid out in streets, etc., by said commissioners under said act; and, therefore, as to all that region, including the locality affected by the proceedings which are now before the court, the mayor, etc., had acquired no powers and assumed no duties by virtue of the act of 1813, save that of applying to the supreme court for the appointment of commissioners to open streets already laid out. But as to *laying out* a new street or public place in the said district, they had no power whatever.

Whenever, therefore, it has seemed expedient to *lay out or open a new street* in that

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part of the city, it has become necessary to apply to the legislature for power to do so.

This course was adopted in the case of Madison avenue, which, not having been laid out by the commissioners under the act of 1807, was laid out and opened by virtue of act of the legislature. (*Chapter 466 Laws of 1860.*)

The same course was adopted as to the extension of Fifty fourth, Fifty-fifth and Fifty-sixth streets. (*Chapter 73 Laws of 1857.*)

1. Also in the proceedings under the act of 1853, to take the park itself. (*Laws of 1853, p. 1167.*)

2. In the proceedings confirmed by the court in taking the land from One Hundred and Sixth to One Hundred and Tenth street for the extension of the park.

3. In the widening of Seventh avenue, under the act of 1864. (*Laws of 1864, p. 637.*)

4. In the widening of Sixth avenue, under the act of 1865. (*Laws of 1865, p. 113.*)

5. In the acquisition of lands by the Croton aqueduct board. (*Laws of 1849, p. 540, § 14.*)

6. In the acquisition of lands by the Croton aqueduct board, in behalf of the mayor, aldermen and commonalty, for a new reservoir. (*Laws of 1853, p. 961.*)

7. In the acquisition of lands by the Croton aqueduct board in Westchester county, etc. (*Laws of 1865, p. 446.*)

8. In the acquisition of lands by the Croton aqueduct board for a reservoir at High Bridge.

In at least six of the above cases, proceedings instituted under exactly the same circumstances, and under laws precisely similar to the one under which the present proceedings are instituted, have been confirmed by this court, and at least three of these have been confirmed at general term.

The same course has been adopted in the case at bar, the Boulevard, &c., authority for laying out which is derived from a special act of the legislature, under which these proceedings have been instituted, and without which the mayor, &c. would have been utterly powerless.

The cases cited by the counsel for Witthaus, therefore, sustaining the proposition that the legislature cannot devolve on officers not elected by the people, or appointed by the local authorities, &c. power to discharge duties theretofore discharged by the mayor, &c., are not in point.

The powers given to the Central Park commissioners by the act of 1865 were not prior to 1846 exercised by local officers.

In further development of this view, the following more detailed statement of the proceedings heretofore had in these matters is submitted to the court.

The power of laying out and opening streets is not a power of such nature that the legislature cannot transfer it; it is not one of the ordinary functions of municipal government.

The legislature has continuously, for more than a century, passed laws directing the manner of laying out streets and roads, and of permitting the common council to do it. Among them may be cited: *Acts of 1741, ch. 712; 1751, Nov. 25; 1754, May 4; 1764, Oct. 20; 1774, March 9; 1787, ch. 61; 1807, ch. 115; 1814, ch. 175; 1815, ch. 151; 1816, ch. 28; 1821, ch. 10; 1826, ch. 166; 1827, ch. 268; 1828, ch. 149; 1828, ch. 264; 1829, ch. 267; 1829, ch. 269; 1830, ch. 8; 1831, ch. 59; 1831, ch. 252; 1832, ch. 89; 1832, ch. 101; 1833, ch. 49; 1833, ch. 98; 1833, ch. 230; 1833, ch. 309; 1834, ch. 174; 1834, ch. 309; 1835, ch. 46; 1835, ch. 268; 1836, ch. 251; 1836, ch. 280; 1836, ch. 279; 1836, ch. 282; 1836, ch. 361; 1837, ch. 177; 1837, ch. 182; 1837, ch. 274; 1838, ch. 148; 1838, ch. 140; 1838, ch. 223; 1843, ch. 53; 1846, ch. 268; 1845, ch. 314; 1845, ch. 146; 1847, ch. 439; 1847, ch. 219; 1847, ch. 203; 1847, ch. 138; 1847, ch. 38; 1850, ch.*

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65; 1851, *ch.* 183; 1851, *ch.* 443; 1852, *ch.* 285; 1857, *ch.* 63; 1857, *ch.* 388; 1857, *ch.* 785; 1859, *ch.* 363; 1860, *ch.* 201; 1860, *ch.* 366; 1860, *ch.* 466; 1860, *ch.* 486; 1862, *ch.* 176.

These include streets in the part of the city *not* laid out by the commissioners of 1807, as well as that part *laid out* by them, north of say Fourth street.

Among these acts are those laying out Hudson street from Greenwich lane to Ninth avenue, Fifth avenue from Twenty-third to Thirty-first street, Twenty-fourth, Twenty-fifth, Twenty-sixth, Twenty-seventh, Twenty-eighth, Twenty-ninth and Thirtieth streets, from Fourth avenue to Sixth avenue; Stuyvesant street, from Bowery road to Second avenue; Irving place and Lexington avenue; Madison avenue, the Bloomingdale road or Broadway, from Twenty-first street to Eighty-sixth street; Wooster street, or University place, from Eighth street to Fourteenth street; Manhattan and Lawrence streets, Fourth avenue (widening), Union place, Tompkins square, Madison square, Mount Morris square.

It is true, as stated by the objector, that section one hundred and seventy-seven of chapter eighty-six of revised laws of 1813 gives power to the mayor, aldermen and commonalty of the city of New York, whenever and as often as it shall, in their opinion, "be necessary or desirable for the public convenience or health, to lay out, form and open any street or streets, or public place or places, in any part of the said city *not* laid out into streets, avenues, squares and public places by the commissioners of streets and roads, in the city of New York, under and by virtue of the act aforesaid." (*Act of April 3d, 1807.*) "To extend, enlarge, straighten, alter or otherwise improve any street or streets, or part of a street, or public place or places, already laid out or hereafter to be laid out, and formed or opened, in any part of the city *not* laid out into streets, avenues, squares and public places by the commissioners aforesaid." But the previous portion of the same section, which is not quoted by the objector, clearly shows that in the part *laid out* by such commissioners, the mayor, aldermen, &c., had no such power.

The common council *has never assumed* to lay out, extend, enlarge, straighten or alter any street, avenue, square or public place, *above or north of say Fourth street, since the passage of the act of 1807, except under special legislative authority first obtained therefor.* It is believed that no exception exists to this rule.

The action of the common council from the year 1807 to the present time, so far as laying out streets, avenues, &c., above, say Fourth street, has been consistent with the 8th section of act of April 3d, 1807, which declares "That the plans and surveys of the said commissioners, or any two of them, in respect to the laying out of streets and roads within the boundaries aforesaid," "shall be *final and conclusive*, as well in respect to the said *mayor, aldermen and commonalty* as in respect to the owners and occupants of lands, tenements and hereditaments, within the boundaries aforesaid, and in respect to all other persons whomsoever."

So completely has the common council not only regarded itself, but also, so completely has it been without power or authority to lay out streets, avenues, squares or public places, within the boundaries laid out under the act of 1807, that in the case of the present Tompkins Market and Hall street adjoining it, and extending from Sixth to Seventh street, *although the Corporation owned the land in fee simple, they did not attempt to lay out the street until the act authorizing it to be done had been obtained.* (*See chap. 267 Laws of 1829.*)

So also in relation to Stuyvesant square and Rutherford and Livingston places, although the cession of the land for the whole improvement was offered, they declined to accept it until an act was passed authorizing the laying out of the square and the streets. (*See chap. 361 Laws of 1836.*)

The road or public drive now in controversy is between Fifty-ninth street and One

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Hundred and Fifty-fifth street, and wholly within that part of the city which was most regularly and thoroughly laid out into streets and avenues by the commissioners appointed by and acting under the act of April 3d, 1807.

The legislature has in frequent cases authorized and directed certain persons to lay out streets, roads, avenues, squares and public places in the city of New York, and declared that they should have exclusive power to do so, and that the plans and surveys made by them should be final and conclusive.

The act of April 3d, 1807, which was passed at the request of the mayor, aldermen and commonalty, appointed Simeon De Witt and others to lay out all the city north of say Fourth street, of the city of New York, and provided that the plans so made "should be final and conclusive against the mayor," &c. (*See Minutes of Common Council, Feb. 16th, 1807.*)

Chapter 103 of laws of 1809 appointed Simeon De Witt and others to lay out Canal street, in the city of New York, and declared their plan should be final and conclusive.

Chapter 201 of laws of 1860 appointed James C. Willett and others commissioners to lay out that part of the city north of One Hundred and Fifty-fifth street, and to make alterations below One Hundred and Fifty-fifth street, and gave them exclusive power to do so, and declared that their plans should be final and conclusive.

By act of 1865, chapter 565; act of 1866, chapter 367; act of 1867, chapter 697; the commissioners of the Central Park have been empowered and directed to lay out streets, avenues, roads, public squares and places, in all the part of the city north of Fifty-ninth street and west of Eighth avenue, and also within a space three hundred and fifty feet in width surrounding the Central Park, as well as to lay out the avenue St. Nicholas, and extend and widen Manhattan street; and all these acts declare that the maps, plans and surveys made shall be final and conclusive.

The legislature has often authorized boards or persons to acquire title to lands required for public purposes, in the name and on the behalf of the mayor, aldermen and commonalty of the city of New York.

The following are some of the cases in which this has been done:

Chapter 103, laws of 1809, appointed Simeon De Witt and others to take the lands required to make Canal street.

Chapter 256 of laws of 1834 authorized the water commissioners for the city of New York to acquire title to land required for the Croton aqueduct; and chapter 328 of 1837 conferred similar powers on them in relation to alterations in the route of the Croton turnpike.

The Croton aqueduct board, by chapter 383 of laws of 1849, chapter 501 of laws of 1853, chapter 449 of laws of 1870, chapter 265 of laws of 1865, were authorized, for and in behalf and in the name of the mayor, &c., to take possession of and use, and acquire title to, land, real estate and property required for laying mains, constructing reservoirs, gate houses, &c.

The board of commissioners of the Central Park, by chapter 101 of laws of 1859, chapter 564 of laws of 1865, chapter 565 of laws of 1865, chapter 367 of laws of 1866, chapter 757 of laws of 1866, chapter 697 of laws of 1867, are authorized, empowered and directed, for and in the behalf and in the name of the mayor, aldermen, &c., to take proceedings to acquire title to the lands required for the extension of the Central Park, the lands required for the streets, roads, public squares and places laid out by them under several laws; also for the widening and opening of Sixth avenue, the avenue St. Nicholas and Manhattan street, as also all streets and avenues laid out under act of April 3d, 1807, north of Fifty-ninth street.

More than twenty miles of streets have been laid out under the act in question, and still more under other similar acts. Inextricable confusion will be created in relation

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to purchases and sales of real estate, made by individuals on the lines of such streets during the past two years, if the proceedings had in full faith of the validity of the laws are not sustained.

These miles of streets are not, it will be recollected, laid out through farm lands, but through city lots, whose value is estimated by the square foot rather than by the acre. Are these layings out to such an immense extent to be disturbed, and the numberless small ownerships fronting on them to be depreciated in value, and deprived of access, *in order that one objector may get a sum for his lands greater than that awarded him by intelligent disinterested sworn valuers?*

III. The court will remember that the streets of the city of New York are not the property of the corporation, as such, but, after the land for them is acquired, they are held in trust for the whole people of the state. (*See People agt. Kerr.*)

The legislature has from time immemorial delegated the power to acquire property by *eminent domain* to corporations, *e. g.*, railroad corporations, turnpike companies; to *quasi corporations*, *e. g.*, boards of supervisors; to *officers by title of office*, *e. g.* the corporation counsel, by act of 1853, and the Croton board and the Central Park by various acts before cited; and to individuals, as in the case of Canal street.

This power is exercised, not in the interest of the corporation alone, but of the whole people of the state, in trust for whom the property, when acquired, will be held.

The motion is made to confirm the report in the name of the mayor, aldermen and commonalty, by their law officer, the counsel to the corporation, who is especially directed by law to do so, and no objection is presented by the mayor, aldermen and commonalty.

IV. There is no distinction between the powers of the Central Park commissioners, as to *streets* and *public places*, under the act of 1865 (*ch. 565, p. 1136*). Section 1 in terms covers "streets, roads and public places;" and the court having determined, in 16 *Abbott*, that the power given to the commissioners to open the Central Park was constitutional, the decision applies with equal force to "roads and streets."

V. The court will take judicial notice that all the city north of Fourth street, within the limits affected by this proceeding, was laid out in streets and avenues by the commissioners appointed under the act of 1807; otherwise affidavits to that effect can be supplied.

VI. The objection that the wedge of land owned by the objector Witthaus cannot be necessary for "a road or drive," but if taken in this proceeding would form a "public place," is without force.

Under section 1 of the act of 1865, the commissioners of the Central Park are empowered "to determine the location, *width*, courses, &c., of said road, and may widen Bloomingdale road," &c.

They have exercised that power in this case. and the road so widened includes the lots of the objector.

It is to be presumed that in so doing they have exercised a reasonable discretion, the opinion of the objector to the contrary notwithstanding. There is nothing in the act requiring the road to be of a uniform width; it may be of varying width.

VII. As to the objection that the commissioners should have completed their report in four months from the time of their appointment, the answer is simple.

First. This proceeding is under a special act of the legislature of 1865, providing a new and independent scheme for laying out streets, and is not governed by the provisions of the former act of 1862, which is quoted to sustain this objection. The act of 1862 refers only to the altering or opening of streets or avenues *then* existing.

Second. Even if it were otherwise, it is in the discretion of the court to allow farther time, and they can do so now, if they think proper.

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VIII. A suggestion from the court deserves attention. The notice and petition in this matter refer to map filed in the park commissioners' office, and accessible to all, also filed in the register's office and office of the secretary of state.

The petition refers to the same map, and a copy of the map is annexed.

This reference sufficiently designates the space, title to which was to be acquired in the proceeding, and no one interested could be misled thereby.

IX. It is submitted to the court that the time for making objections to the authority of the commissioners of assessment, etc., in this matter, has gone by.

The counsel to the corporation, on behalf of the mayor, etc., and in obedience to the law of 1865, made application to the supreme court for the appointment of commissioners.

Ample notice to all parties owning property to be affected by this matter was given, by publication thereof in certain newspapers, according to law.

No objection was made on the part of Mr. Witthaus to that application, and the commissioners herein were thereupon appointed.

In the performance of their duties they adjudicated upon the claims of Mr. Witthaus.

These claims were presented by him to them, without any objection on his part as to their authority to pass upon the same.

He now, by his counsel, appears before the general term, which holds in these matters the position of an appellate court, and presents to it a plea to the authority of the inferior tribunal before which he has voluntarily and without any objection discussed his claim.

This course is in violation of all principles of sound logic. "*Consensus tollit errorem.*" (*Broom's Legal Maxims.*)

X. The commissioners of estimate and assessment were appointed to examine and decide such questions, to hear evidence, view the land, and ascertain all the facts and opinions which could throw a light on the subject.

They have done so and decided.

Again, on receipt of the written objections of Witthaus, they further discussed the matter, and raised his award as far as they deemed it expedient to do.

This court, sitting at general term, cannot possibly reverse their decision without a thorough examination of all the grounds on which it was formed, without, in fact, doing all, hearing all, seeing all, that the commissioners have done, heard and seen.

The affidavits of the objector and his friends do not agree with one another.

One values the property at sixty thousand dollars; another forty-five thousand dollars.

All these values are merely speculative.

The affidavits produced by the commissioners are more likely to be disinterested and reliable.

But the whole subject is out of the reach of the court.

No error of law has been committed by the commissioners, and the court cannot review their decision on a mere question of fact.

XI. But even were it proper for the court to reverse the action of the commissioners in making the awards complained of, it can be satisfactorily shown that the objections to the awards are unreasonable and unjust.

As to the objections four, five and six, that the award to the objector Witthaus is inadequate, and a violation of the principle which should have governed the commissioners, counsel submits the following remarks and statements:

The true way to regard the award so as to judge whether all the elements of value

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of the land taken have been considered, is to compare the award for it with the award for land similar in other respects in the same neighborhood.

The award for objector's land No. 45, contents, 4,350 sup. feet; per sup. foot, \$5.62..... \$24,000

The award for three lots, northwest corner of Seventy-third street and Broadway, diagonally opposite to objector's piece, Nos. 63 and 64, contents 5,636 sup. feet; per sup. foot, \$3.80..... 21,500

At this rate the objector's award would have been, 4,280 sup. feet, at \$3.80 per sup. foot..... 14,550

At the rate for Mr. Witthaus' award, that Nos. 63 and 64 would be 5,636 sup. feet, at \$5.62..... 31,683

Comparing Mr. Witthaus' award with the award for parcel on the southwest corner of Broadway and Seventy-first street, opposite to this land:

Award for Nos. 61, 60, 59, 58, contents, 5,890 sup. feet; per foot, \$3.87..... \$22,700

At this rate, objector's award would have been 4,250 sup. feet, at \$2.87 per foot..... 12,197

At the rate of objector's award, that for Nos. 61, 60, 59, 58, would have been, 5,890 sup. feet, at \$5.62 per foot..... 33,110

Comparing Mr. Witthaus' award with the award for the whole front on Broadway, between Seventy-second and Seventy-third streets, and opposite his land, to wit:

Nos. 54, 55, 56, 57, 58, 59, 60..... \$58,385
Contents, 15,780 sup. feet, or \$3.66 per foot.

At this rate the objector's award would have been, 4,520 sup. feet, at \$3.66 per foot..... 16,545

At the rate of objector's award, that for Nos. 54, 55, 56, 57, 58, 59, 60 and 61, 15,780 sup. feet, at \$5.62 per foot..... 88,234

And this last parcel of eight lots includes the northwest corner of Seventy-second street, a hundred foot street.

Comparing Mr. Witthaus' award with the award of an outside lot, one with only one front on the above block, and opposite to his lots, to wit:

No. 59..... \$6,155
Contents, 1,955 sup. feet, or \$3.15 per foot.

At this rate the objector's would have been, 4,250 sup. feet, at \$3.15 per foot..... 13,387

At the rate of objector's award, that for No. 59 would have been, 1,955 superficial feet, at \$5.62 per foot..... 10,987

These comparisons are ample to show, first, that Mr. Witthaus received an award much more than land in his immediate neighborhood; and as the only cause urged for the greater value claimed for his land is that it has three fronts, it is conclusive that the commissioners did take into account that element, and whatever other elements of value existed.

As to the piece of Mr. Groves, being the block between Sixty-fifth and Sixty-sixth streets and Broadway and Ninth avenue, No. 24, award.... \$90,000
Area, 17,185 superficial feet; award per foot, \$5.20.

Compared with award on lots northeast corner of Sixty-sixth street and Broadway, Nos. 25, 26 and 27, award..... 35,191
Area, superficial feet, 83,300; award per foot, \$4.10.

At this rate, Mr. Groves would receive for his plot (17,195 superficial feet, at \$4.10 per foot)..... 70,358

At the rate of Groves', Nos. 25, 26 and 27 would receive, for 8,430 superficial feet, at \$5.20 per foot..... 43,836

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And this with an average of nearly ten feet of rock on Mr. Groves' piece.

As to objection of Mr. Campion for about four lots on northeast corner of Broadway and Sixty-first street, being half the block on Broadway, and eighty-six feet nine inches in depth:

He receives \$51,500

The next plot on the same block, same size, southeast corner of Broadway and Sixty-second street, receives..... 43,836

The next plot, on the northeast corner of Sixty-second street, same size as Mr. Campion's..... 39,520

The mortgage referred to, as estimate of property, covers more lots than those taken.

XII. For the above reasons, it is submitted that no error in law or fact has been committed in these proceedings, and that the report of the commissioners should be in all respects confirmed.

Mr. LAWRENCE in reply to the points of the commissioners of the Central Park:

First. It having been asserted by one of the counsel moving for the confirmation of the report in this matter, that the mayor, aldermen and commonalty of the city of New York, and their officers, never had the power which is sought to be conferred upon the Central Park commissioners by the act of April 24, 1865, and under which this proceeding is taken, it becomes important to state their powers more fully than was done upon the points heretofore presented by the objector.

A. And first we say, that the mayor, aldermen and commonalty were vested with such powers by the Montgomerie charter.

The sixteenth section of the Montgomerie charter, provides as follows:

"And we do further, for us, our heirs and successors, give, grant, ratify and confirm unto the said mayor, aldermen and commonalty of the city of New York, and their successors forever, that the common council of the said city, for the time being, or the major part of them have, and from time to time, and at all times hereafter forever, shall have full power, license and authority, not only to establish, appoint, order and direct the making and laying out of all other streets, lanes, alleys, highways, watercourses and bridges, not already made or laid out, but also the altering, amending and repairing all such streets, lanes, alleys, highways, watercourses and bridges, heretofore made or laid out, or hereafter to be made or laid out, in and throughout the said city of New York, and the Island of Manhattan's, in such manner as the said common council, for the time being, or the major part of them, shall think or judge to be necessary and convenient for all inhabitants and travelers there."

There could not be a broader or more comprehensive grant of power, in reference to streets and highways in any and every part of the Island of Manhattan, than is contained in the foregoing section.

B. In the next place we say, that the design of the legislature evidently was, by the act of 1813, to provide a general scheme for the laying out of streets, avenues, &c., in the city of New York, and to confer upon the mayor, &c., and their officers full power and authority to take all proceedings which might be necessary for the acquisition of the title to the lands required for such purpose, and for the subsequent improvement, regulation, grading, paving and repairing of the same.

As only a portion of the 177th section of that act is set forth in the points used on the argument, it is here given entire:

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"CLXXVII. *And be it further enacted, that whenever and as often as the mayor, aldermen and commonalty of the city of New York, shall be desirous to open any street, avenue, square or public place, or any particular part or section of any street or avenue laid out by the commissioners of streets and roads in the city of New York, under and by virtue of the act entitled 'an act relative to improvements touching the laying out of streets and roads in the city of New York, and for other purposes,' passed April 3, 1807; and also whenever and as often as so many proprietors of lands fronting on any such street, avenue, square or public place, or any particular part or section of any such street, avenue, square or public place, as shall together own three-fourth parts of all the lands fronting on such street, avenue, square or public place, or on such part or section of any such street, avenue, square or public place, shall, by petition, desire the said mayor, aldermen and commonalty to open any such street, avenue, square or public place, or any such particular part or section of any such street, avenue, square or public place, and the said mayor, aldermen and commonalty shall deem the opening thereof to be necessary or useful; it shall be lawful for the said mayor, aldermen and commonalty to cause the same to be opened, and the lands, tenements and hereditaments that may be required for the purpose of opening the same, may be taken for that purpose, and compensation and recompense made to the parties and persons, if any such there shall be, to whom the loss and damage thereby shall be deemed to exceed the benefit and advantage thereof, for the excess of the damage over and above the value of the said benefit, in the manner hereinafter for that purpose directed and prescribed; and whenever and as often also as it shall, in the opinion of the said mayor, aldermen and commonalty in common council convened, be necessary or desirable for the public convenience or health, to lay out, form and open any street or streets, or public place or places in any part of the said city, not laid out into streets, avenues, squares and public places by the commissioners of streets and roads in the city of New York, under and by virtue of the act aforesaid, or to extend, enlarge, straighten, alter or otherwise improve any street or streets, or part of a street, or public place or places already laid out, or hereafter to be laid out, and formed or opened in any part of the said city not laid out into streets, avenues, squares and public places by the commissioners aforesaid; it shall be lawful for the said mayor, aldermen and commonalty of New York to order and direct the same to be done, and to cause the same to be done accordingly in such manner as they shall think most advisable, notwithstanding it may become necessary for that purpose to remove any building or buildings, or take any lands, tenements, hereditaments or premises whatsoever; and if the said mayor, aldermen and commonalty shall require any lands, tenements, hereditaments or premises of any person or persons, or body politic or corporate for any such purpose, the same may be taken and appropriated to such use, and compensation and recompense made to the parties and persons respectively, if any such there shall be, to whom the loss and damage thereby shall be deemed to exceed the benefit and advantage thereof, for the excess of the said damage above the said benefit, in the manner for that purpose hereinafter mentioned and provided."* (See Act of 1813, § 177; Davies, Laws, 527, 528, 529.)

In reference to this section, we say that, taken in connection with the ample powers already conferred upon and vested in the mayor, &c., of New York, by the Montgomerie charter, the whole power of opening, laying out, grading, etc., of streets in the Island of Manhattan, was conferred upon the city authorities.

1st. The first part of the section confers the power to make application for the opening of any street, avenue, &c., laid out by the commissioners appointed under the act of 1807.

2d. The second part of the section confers the power to lay out, form and open any

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street or streets, or public place or places, in any part of the city, not laid out by the commissioners of streets and roads, &c., and to make the necessary applications for acquiring the lands therefor.

C. In the next place we say, that the powers above referred to are local powers, and have, ever since the organization of the government of this state, been recognized as such.

We are thus brought down to the question, whether the act of 1865 is in conflict with the section of the constitution set forth in our previous points.

In examining this question, we cannot do better than to quote from the recent opinion, delivered by Judge GROVER, of the court of appeals, in rendering the decision of that court, in the case of *The People* agt. *Raymond*, deciding that the act of 1867, chapter 410, authorizing the appointment of commissioners of taxes and assessments by the governor and senate, was in conflict with the provisions of the section of constitution above referred to. He says:

"To determine whether the act in question is constitutional, so far as the power of appointment is thereby vested in the governor, with the consent of the senate, it is necessary to determine whether the office in substance existed at the time of the adoption of the present constitution; and if found not so existing, then the further question whether city, town and county offices subsequently created, may be filled in any mode prescribed by the legislature. To determine the first question, it is necessary to ascertain the functions and duties of the office in question. Thus upon examination of the act in question (the act of 1859, p. 678, the acts of 1857 and 1850), and the previous legislation, these will be found to consist of power to appoint deputies, clerks, etc.; who, together with the officers in question, by performing the various duties of their respective offices, are to make an assessment of all the property liable to taxation in the city for municipal and state purposes. To correct the rolls of such assessments, and to equalize the same, and to preserve such rolls in an office to be kept by them, and deliver the same to those whose duty it is to levy the taxes upon such rolls, authorized upon the property of the city. *It is necessary also, to inquire whether the like functions were performed by any officers prior to the existing constitution.* This, all know, must have been so, as taxation upon property is not wholly of modern origin, but has existed at intervals for state purposes, and at all times for municipal purposes, since the existence of the state; and there must necessarily have been at all times some mode by which a valuation of the property, liable to taxation, was made by public authority, as a basis upon which taxes were apportioned among its owners. An examination of the statutes in force at the adoption of the constitution, will show that such valuation was then made by assessors, chosen by the electors of the respective wards of the city, two in each ward. That these ward assessors were required to assess all the taxable property in their respective wards; and when this was completed, they were all required to meet together as a board, and when so met, to compare, equalize and correct all the assessment rolls of the city; and when completed, the assessors were to deliver the same to those whose duty it was to apportion the taxes required to be collected upon the basis of such valuation. *Thus it appears that precisely the same essential functions were performed in making, equalizing, correcting and delivering the assessment rolls by the ward assessors at the time of the adoption of the constitution, that were contemplated to be performed by the commissioners of taxes and assessments by the act in question; that, although the names of the officers and their mode of appointment have been changed, the result to be accomplished by the one is identical with that of the other. But it is argued on the part of the appellant that additional powers have been conferred and additional duties imposed upon the commissioners.* This is true. They are to keep an office during the entire year, in which the rolls are to be kept for

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inspection; they are to procure and preserve maps of the lots in the city; to keep a record of the building permits; to them power is given to insert in the rolls of property which has been omitted, and to do some other acts, none of which were required of the assessors, and which they were not authorized to do. *But an examination of these new duties and powers will show that they are all such as are calculated to facilitate and the better enable them to perform the same essential duty performed by the assessors—that is, of perfecting a valuation of the property as a basis of taxation. Such additional facilities in the performance of the same duties, surely cannot make them new officers in the sense of the constitution. If they can thus be made new, the section of the constitution, above quoted, may readily be made a mere nullity. I am far from conceding that it would be competent for the legislature to take from the city all control over the assessment of the property of the city for purposes of taxation, and vest this power in the central authority, by conferring powers upon officers or boards, upon which they conferred it over other subjects, and imposing duties upon them entirely foreign to those of making the assessment. The plain intention of the section of the constitution in question was to preserve to localities the control of the official functions of which they were then possessed; and this control was carefully preserved, consistent with the power of the legislature to make needful changes, by restricting the power of appointment of other officers to perform the same functions to the people, or some authority of the locality. Any other construction would render the section in question, when applied to the cities of the state, substantially nugatory. It is not enough that the name of the officer is changed or the powers enlarged, to authorize the legislature to confer upon the governor the appointment of officers to discharge the duties performed by city officers at the adoption of the constitution.”*

By the first section of the act of 1865, it is provided that:

“The commissioners of the Central Park shall have and possess exclusive power to lay out streets, roads, public squares and places, within that part of the city of New York to the northward of the southerly line of One Hundred and Fifty-fifth street, of such width, extent and direction upon such grades as to them shall seem most conducive to public good; and it shall be the duty of the said commissioners, as soon after the passage of this act as may be, to lay out a road or public drive running from the northerly portion of the Sixth or Seventh avenue in a generally northerly or northwesterly direction, upon the easterly or Harlem river side of the city, as far north as the said commissioners may determine; thence in a general westerly direction to or near the Hudson river, and thence in a general southerly or southeasterly direction along the westerly or Hudson river side of the city, until such road or public drive shall enter the Central Park at or near the junction of the Bloomingdale road, Eighth avenue and Fifty-ninth street; such road to follow the course of the Bloomingdale road below One Hundred and Sixth street, whenever the commissioners shall deem such course advantageous. The said commissioners shall determine the location, width, courses, windings and grades of said road, and public drive, and may widen the Bloomingdale road, and determine the grades thereof, and of intersecting streets and avenues, as they may deem it necessary for the perfecting of such road or public drive.” (*Laws of 1865, 1136.*)

By the fourth section of the act of 1865, it is provided that:

“The commissioners of the Central Park, for and in behalf of the mayor, aldermen and commonalty of the city of New York, are authorized to acquire title for the use of the public to all or any of the lands required for the streets and roads, public squares and places, so laid out by them, or any portion of said streets, roads, public squares and places, whenever they shall deem it for the public interest so to do, and such commissioners may for that purpose make application to the supreme court, in the first judicial district, for the appointment of commissioners of estimate

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and assessment, specifying in such application the lands required for that purpose; and the proceedings to acquire title to such lands shall be had pursuant to such acts as shall then be in force, relative to the opening of streets, roads and public squares and places in the city of New York, which said acts, so far as the same are not inconsistent with the provisions of this act, are hereby made applicable to the streets, roads, public squares and places so laid, or to be laid out by the said commissioners of Central Park, in the same manner and to the same extent as if the said streets, roads, squares and places had been originally laid down as and for public streets, roads, squares and places, by the commissioners appointed in and by the act entitled 'an act relative to improvements touching the laying out of streets and roads in the city of New York, and for other purposes,' passed April 3, 1807, except that the said commissioners of estimate and assessment, who may be appointed as herein provided, may assess for such opening all such parties and persons, lands and tenements, as they may deem to be benefited by such improvement, to the extent which said commissioners deem such parties, persons, lands and tenements benefited thereby, provided, that as to streets or roads more than one mile in length, not more than one-half of the amount awarded for damages and of the expenses attending such opening, shall be so assessed, the amount of such damages and expenses not so assessed being hereby made a charge upon the county of New York, to be paid as hereinafter provided. The moneys collected upon the assessments of the commissioners of estimate and assessment shall be paid into the county treasury. (*Laws of 1865, 1138.*)

It will be perceived that by the sections above quoted, the Central Park commissioners have exclusive power to lay out streets, roads, public squares and places, northward of the southerly line of One Hundred and Fifty-fifth street.

This is a part of the city *not laid out* into streets, &c., by the commissioners of 1807. Their plan only extended to One Hundred and Fifty-fifth street.

Now, by the act of 1813, the corporation of the city had full power "to lay out, form and open any street or streets, or public place or places, in any part of the said city *not laid out* by the commissioners of streets and roads," appointed under the act of 1807, and to make the application to the court for taking the lands required therefor. (*See § 177, supra.*)

These are precisely the powers which are now sought by the act of 1865, to be given to the commissioners of the Central Park.

D. If it should be said that the public road or drive which forms the subject of this proceeding, is bounded by One Hundred and Fifty-fifth street and Fifty-ninth street, and therefore it is within the section of the city which was laid out by the commissioners of streets and roads, we answer that,

1st. We conceive that under the provisions of the section of the Montgomerie charter above set forth, the corporate authorities possessed the power to lay out and form such a road or drive in the section of the city laid out by the commissioners aforesaid. (*Charter. § 16, supra.*)

2d. That the powers conferred by the act of 1813, are merely cumulative to those granted by the Montgomerie charter, and that said act does not take away the rights granted by the charter-

3d. That the whole charge of the proceedings in the city of New York, relative to opening streets therein having been committed to the mayor, &c., by the act of 1813, the power was a local function which was preserved to the city by the constitution of 1846.

4th. That the act of 1865 presents a general system, scheme or plan of improvement, and that the different parts of such plan and scheme are so interwoven that

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they cannot be separated ; and if the act is unconstitutional as to one part of the scheme, it is void as to the whole.

E. Again, the eighth section of the act of 1865 confers upon the commissioners of the Central Park power "from time to time to cause such of said streets, roads, squares or places, as they may designate for that purpose to be regulated, graded and improved as streets or as country roads, or in such manner as the said commissioners may deem for the public interest, and may direct, and for that purpose, and in and about such regulating, grading and improvements the commissioners of the Central Park shall have power and enjoy all the powers now or heretofore possessed, enjoyed or exercised by the mayor, aldermen and commonalty of the city of New York as to other streets and roads, and by such commissioners in respect to the Central Park in said city," &c.

Under the 175th section of the act of 1813, it is provided as follows :

"*And be it further enacted*, That it shall be lawful for the said mayor, aldermen and commonalty to cause common sewers, drains and vaults to be made in any part of the said city, *and to order and direct the pitching and paving the streets thereof*, and the cutting into any drain or sewer, and the altering, amending, cleansing and scouring of any street, vault, sink or common sewer within the said city, and the raising, reducing, leveling or fencing in any vacant or adjoining lots in the said city, and to cause estimates of the expense of conforming to such regulations to be made, and a just and equitable assessment thereof among the owners or occupants of all the houses and lots intended to be benefited thereby, in proportion, as nearly as may be, to the advantage which each shall be deemed to acquire." (*Davies' Laws*, p. 526.)

The act of 1865 distinctly transfers the powers of the corporation relative to regulating and grading streets above One Hundred and Fifty-fifth street to the commissioners of the Central Park.

It seems clearly to follow, then, that the act of 1865 is unconstitutional, because it takes away from the mayor, aldermen and commonalty of the city of New York local functions and powers which they were in possession of and exercised long prior to the adoption of the constitution of 1846, and transfers them to the commissioners of the Central Park, who are officers appointed by the legislature—officers in whose appointment neither the electors of the city nor the local authorities had any choice. (*Laws* 1857, vol. 2, p. 715; *Laws* 1859, p. 857; *Laws* 1861, p. 164; *Laws* 1866, vol. 1, p. 822, § 8.)

Second. As to the case of the Central Park extension (16 Abb. 56), it is only necessary to observe :

1st. That it was decided before the decisions in the recent cases in the court of appeals, construing the section of the constitution which we refer to, and defining the powers and rights of localities under that section. (*People* agt. *Raymond*, 1868; *Devoy* agt. *Mayor, &c.*, 36 N. Y. p. 449; and see Judge INGRAHAM's opinion in *People* agt. *Board of Metropolitan Police*, 33 How. 52, 61; and see Judge SMITH's, in same case, p. 62.)

2d. That it was a decision made at special term, and although entitled to great respect, is not controlling at general term.

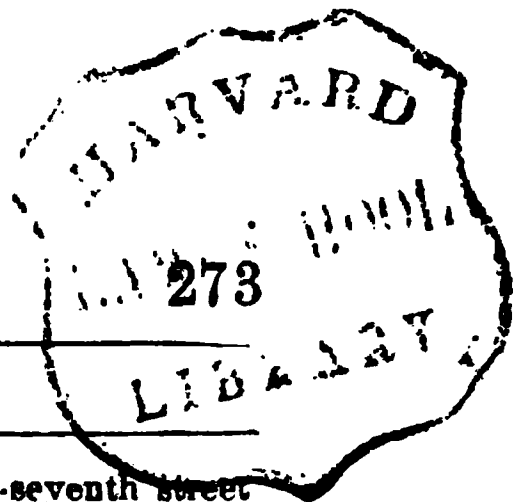
3d. That the main point discussed in that case was as to the legality of the appointment of the Central Park commissioners themselves.

Third. The objector Witthaus had no such notice of the application for the appointment of the commissioners of estimate, and of the nature and extent of the improvement, as was contemplated by the statute. (*Laws* 1839, p. 183.)

The notice states that the said road or public drive is "to commence at the junction of Bloomingdale road, or Broadway, Eighth avenue and Fifty-ninth street; running thence northerly or northeasterly, and following the general course of

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Bloomingdale road, or Broadway, to the northerly side of Eighty-seventh street, etc. * * * * Said road or public drive includes the whole of said Bloomingdale road, or Broadway, between Fifty-ninth and One Hundred and Seventh streets, except a portion thereof between Seventy-fifth and Seventy-seventh streets and another portion thereof between Eighty-sixth and One Hundred and Fourth streets, in the city of New York. Said road or public drive is of a general width of one hundred and fifty feet, as shown and delineated on a certain map of the same, made by Gardner A. Sage, city surveyor, and now on file in the office of the commissioners, of Central Park."

The land of Mr. Witthaus borders on Broadway, but to take it for the proposed improvement the commissioners, instead of laying out the road or public drive on the general course of Bloomingdale road, have turned off their line at right angles, or nearly so.

There is nothing on the face of the notice to advise Mr. Witthaus that the road was to be more than one hundred and fifty feet in width at the point where his property was situated.

The reference to the map on file in the office of the commissioners of the Central Park does not obviate this defect, because the act of 1839 requires that "the notice shall specify the nature and extent of the intended improvement. (*Laws 1839, § 2, p. 183.*)

The notice in this case does not state the extent of the improvement, and it is also calculated to mislead the parties interested as to the nature of the improvement. The proceedings being statutory, the power sought to be exercised under the statute must be strictly followed. (*Sharp agt. Spier, 4 Hill, 76; Sharp agt. Johnson, 4 Hill, 92; Rathbun agt. Acker, 18 Barb. 393.*)

Fourth. There was no answer made on the argument to the point that under the provisions of the act of 1862, entitled "An act to prevent fraud in the opening and laying out of streets and avenues in the city of New York," the commissioners were bound to complete their proceedings within four months from the time of their appointment, unless further time is allowed by the supreme court, except that the act did not apply to this case. (*Laws 1862, p. 967.*)

(a.) We answer that it does apply to this case, and is made applicable to it by the act of 1865. (*Laws of 1865, p. 1138.*)

(b.) That the act of 1862 is referred to in these proceedings as being one of the acts under which they are taken. (*See order appointing commissioners.*)

Fifth. The points above taken were prepared in reply to the argument made on the motion to confirm the report, and before the printed points of the corporation counsel were received by us. There are a few points made by the learned counsel, to which we further reply as follows:

Sixth. The objection in the counsel's ninth point, that it is too late for Mr. Witthaus to object to the authority of the commissioners, for the reason that he appeared before them and argued his objections there, is not well founded in reason or in law.

(a.) The objection to the jurisdiction of the commissioners was taken in the objections filed by the objector.

(b.) If we are right in the supposition that the act of 1865 is unconstitutional, it is a mere nullity, and no jurisdiction can be acquired under it.

(c.) Where a tribunal has no jurisdiction of a subject matter, no consent of parties can confer such jurisdiction. (*Dudley agt. Mayhew, 3 Comst. p. 10; Davis agt. Packard, 6 Peters, p. 276; Coffin's ex'rs agt. Tracy, 3 Caine, p. 128; Lindsley agt. McLeland, 1 Bibb, p. 262; Heyer agt. Burger, Hoffman's Chan. 1; Beach agt. Nixon, 5 Seld. p. 35.*)

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(d.) The objection to the jurisdiction can be taken at any time. (*Garcie* agt. *Sheldon*, 3 Barb. p. 232; *People* agt. *N. Y. Marine Court*, 3 Abb. p. 309.)

Seventh. The counsel, by his second point, admits that under the act of 1813 the mayor, &c., had power to open streets in that part of the city *not* laid out under the act of 1807. As we have stated in our first point (subdivision C), the commissioners of 1807 only laid out the city to One Hundred and Fifty-fifth street. (*See Report of Commissioners, Davies*, p. 438; *See map of Commissioners, 1807.*)

The counsel is in error in supposing that the whole of the city was laid out above Fourth street.

As far, then, as the power to lay out streets, &c., above One Hundred and Fifty-fifth street, is concerned, the act of 1865 is in conflict with the constitution of 1846; and as the act of 1865 consists of one general scheme or plan, one part of which is void, the whole must fall.

Eighth. As to the powers of the mayor, &c., under the act of 1813, and under the *Montgomerie* charter, it seems unnecessary to add anything to what we have stated in our first point.

Ninth. As to the points upon the question of value, we refer to the printed points submitted by us on the argument.

Tenth. As to the point made in the second point of the counsel, that inextricable confusion and serious damage would result from declaring the act of 1865, and the other acts which are referred to, to be unconstitutional, the plain and conclusive answer is, that it is much better to ascertain now, when the proceedings of the commissioners of the Central Park have, as it were, just commenced, whether those proceedings are legal or illegal, than to wait until the contemplated improvements have been made and the assessments therefor are laid.

The confusion and damage which would result now are unimportant and insignificant, when compared with the damage that must ensue at a later period, if those acts are then determined to be in conflict with the constitution.

These questions will have to be met in the proceedings to set aside the assessments imposed under the authority and powers delegated to the commissioners.

Again, the practical effect of the acts referred to by the learned counsel, enlarging the powers of the commissioners of the Central Park, is to abolish the mayor, aldermen and commonalty of the city, so far as the streets are concerned, between Fifty-ninth street and the northern limit of the island, and to substitute the park commissioners in their place. This is a change of the gravest and most serious character, not to be upheld, unless clearly within the powers of the legislature, and clearly in accordance with the constitution.

If there is any vitality in the *Montgomerie* charter, any force in the solemn confirmations of that charter which have from time to time been made by the state, all the powers now sought to be intrusted to the park commissioners have been lodged in the corporate authorities for nearly two centuries. and it would be far more reprehensible to sustain legislation which nullifies that charter than to declare such legislation to be null and void.

Eleventh. As the points of the counsel have been served upon us at a time which renders it impossible to print a more extended reply, we now submit this case to the court upon the points above taken, and upon those presented by us at the argument, confidently believing that it will receive the full and thorough consideration which its importance demands.

By the court, INGRAHAM, J. The objection taken to these proceedings, on the ground that the act is unconstitutional,

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cannot be sustained. The power, it is alleged, to make the application, which by the act is vested in the commissioners of the Central Park, should have been given to the common council, and the objectors claim the act on that account to be unconstitutional. The common council never had authority, since 1807, to lay out any streets or public places in that part of the city which was embraced in the map of the commissioners filed under the act of 1807. Their power was below the limits embraced in that map, and the authority conferred upon the commissioners did not in any way interfere with the authority previously bestowed on the common council. The act of 1813 expressly limited their powers to that part of the city not laid out by virtue of the act of 1807. They had no authority to lay out or open any but such as were provided for on the said map. The authority conferred on the commissioners is not that of any local officer, nor does it authorize them to discharge the duties of any office, but it provides for a discharge of a mere ministerial act, viz., presenting to the court a petition for the opening of a street. So far as the objection is taken here, we are to treat it as a mere authority for such a purpose to make an application to the court for the opening, and that power may, I think, be conferred on the commissioners. This objection was made to the proceedings in the matter of the Central Park extension, (16 *Abb.* p. 56.) I see no reason to change the views thus expressed by me against the validity of the objection.

I do not intend to be understood as holding that all the powers conferred on the commissioners by this statute are valid. The right to grade streets in this city has always been exercised by the common council, as well as other powers conferred by that act on the commissioners, and it may well be doubted whether the legislature can take from the common council this power and confer it on state officers. It is not, however, necessary on this application to decide this point, and I make the suggestion merely to avoid the

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supposition that it is intended in this decision to validate all the powers granted by that statute.

The legislature might have laid out this drive in the act, and having that power, they might authorize others to do it. In fact, no such road or drive could be laid out without the authority of the legislature; and whenever it has been necessary to open any new street or avenue not laid down on the map, such legislation has been deemed necessary, and the limits of the street or avenue have been fixed by the statute. There are several cases where such acts have been passed, without any action of the common council, such as Madison avenue, part of Second avenue, and others, where proceedings have been taken by other parties than the common council. The limitation of four months within which the commissioners are required to complete their report, contained in the act of 1862, does not apply to this proceeding. It applies to streets and avenues in the city north of Fourteenth street, and must be confined to streets and avenues then laid out as such, and is not to be applied to such a work as that contemplated by this statute. It is evidently impracticable properly to complete such a work within that limitation.

Objections are made in several cases to the amounts allowed by the commissioners for the property taken, and the court is asked to review the decisions of the commissioners in this respect. It has been long since settled, and has uniformly been acted upon by this court, that a mere error of judgment in the valuation of property taken was not the subject of review on a motion to confirm the report, unless the sum allowed was grossly inadequate and unequal as compared with other valuations, or unless some wrong principle was adopted as to the amount allowed. There are good reasons why such a rule should be enforced. The commissioners have the opportunity of examining the property, of seeing its location and condition, its adaptation to use, and of inquiry as to value, not in the power of the court, and

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the result of such examinations and inquiries cannot be brought before the court. There may have been difference of opinion between the owners and the commissioners as to these values, but we see nothing in this difference justifying us to interfere. There is no error in law in any mode of valuation which has been adopted, and we see no ground on which, according to all former decisions, we could interfere with the valuations as made by the commissioners, in the case of any of the parties objecting.

The remaining objection is to the taking of gores outside of the line of the road as laid out, if the same is to be of one continuous width. The statute describes it as a road or public drive running from the northerly portion of the Sixth or Seventh avenues, &c., and to enter the Central Park at or near the junction of the Bloomingdale road, Eighth avenue and Fifty-ninth street, and to follow the course of the Bloomingdale road below One Hundred and Sixth street, when the commissioners should deem such course advantageous. It then provides that they shall determine the location, *width*, courses, windings, &c., of said road.

It is very clear that this act does not authorize the taking of any land not required for the drive or road, and the latter provision seems to prescribe an uniform width to the road very inconsistent with the lines as adopted on the map filed.

The act of 1839, page 182, directs how the commissioners shall be appointed, viz., by a notice specifying the time and place of the application and the nature and extent of the intended improvement. This provision is made necessary by the act of 1865, in regard to this proceeding.

Under this provision, I think it is necessary that the whole extent of the intention of the opening should be stated in the notice. The owners are to be informed by it what property is to be taken. A reference to a map on file in some public office is not a compliance with the statute.

It is said that the owners have in some cases appeared before the commissioners and claimed allowances for their

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lands, and therefore cannot now object. But that cannot give jurisdiction, if it is not acquired in the mode prescribed by law. Suppose they had proceeded, in addition to the road, to take land for a square outside of the drive, and the owners submitted their claims, it could not be upheld that the commissioners thereby acquired jurisdiction to take the same. They must be confined to the land which the notice describes as required for the improvement.

Considering the intent of the statute to make a road of an uniform width, and the notice as given of such a road, without referring to the gores outside of the road, I do not see the necessary authority for taking land outside of the lines of the road as laid out by them. But this is not all. The notice not only does not include these gores, but virtually excludes them, by the following: "Said road or public drive is of a general width of one hundred and fifty feet, as shown on a certain map," &c. Parties owning lands outside of the road so described could not be notified that it was intended to go outside of these lines and take large parcels of land at different places on the route. The commissioners had no jurisdiction to take these gores, and, so far as they are included in these proceedings, they are erroneously taken.

The report should be sent back to the commissioners, with directions to omit the valuation of the land outside of the road, as described in the notice; to deduct the amount awarded therefor from their assessment, in such manner as they shall deem just; and to assess the same for benefit, if such lands are benefitted by the improvement.

BARNARD and SUTHERLAND, Justices, concurred.

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SUPREME COURT.

MARY FLYNN agt. MILLIE D. POWERS.

The separate estate of a *married woman* is liable for a *deficiency on a foreclosure sale* of mortgaged premises which she purchased, and *assumed to pay the mortgage* as a part of the consideration for such purchase. (*This follows the decision in the case of Ballin agt. Dillaye, ante, p. 216.*)

Where such married woman was an *infant* under twenty-one years of age, at the time she received the deed and assumed to pay the mortgage: *held*, that her subsequent acts in conveying the premises with warranty of title and taking the purchaser's covenant to assume the same mortgage which she had assumed; and also her appearance by attorney in the foreclosure suit, and no question of infancy being raised, was an affirmation of the whole transaction which established her liability, free from any disability of infancy.

Kings County Special Term, January, 1868.

THIS action was brought by the plaintiff against the defendant, to recover a deficiency arising on the foreclosure of a mortgage on real estate which the defendant, a married woman, bought of the plaintiff, subject to the mortgage, and which she assumed in the deed of conveyance to her to pay. The defendant afterwards sold it to one John Brower, who also assumed and agreed to pay the mortgage. The mortgage was foreclosed and the property was sold, and a judgment for \$1,504 deficiency entered against one Walsh the original mortgagor, for such deficiency. The plaintiff, in this case, paid such deficiency to Walsh and took an assignment of it, and brought this suit to recover it, asking to charge the defendant's separate estate for the amount.

At the time the defendant received the deed and assumed to pay the mortgage, she was an infant under the age of twenty-one.

HENRY PARSONS, *for plaintiff.*

IRA D. WARREN, *for defendant.*

TAPPEN, J. The later decisions of the court of appeals appear to meet and govern the first question in this case.

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They will be found in *Owen agt. Cawley* (36 N. Y. R. 600, June, 1867), and in *Ballin and others, Executors agt Dillaye, &c.* September, 1867, in Ms. (*Reported ante*, p. 216.) In this case quoting the chancellor in *Gardner agt. Gardner* (7 Paige, 112), the court says, the wife may have a separate estate of her own, which estate is chargeable in equity for any debt she may contract on the credit or for the use of such estate, also citing *North American Coal Co. agt. Dyett* (7 Paige, 9), *Gall agt. Dederer* (18 N. Y. R. 265), and *White agt. McNett* (33 N. Y. R. 371).

In the case under consideration the defendant had a separate estate. The obligation which she took upon herself, was for the benefit of her separate estate, and indeed in this case, that obligation enabled her to acquire a separate estate; "for how can it be said that a debt contracted upon the purchase of property which a purchaser takes into possession and enjoys, and disposes of at an apparent profit, is not a debt contracted for the benefit of the purchaser's estate.

Her separate estate as a whole, becomes liable for any indebtedness contracted by her for its benefit to any extent: A lien does not exist for her engagements at large, but may be deduced from an express or implied agreement to that effect on her part, or from some equivalent obligation resulting from her act by operation of law.

In this case Mrs. Powers the defendant, in conveying the premises to Brower, made the conveyance subject to the two existing mortgages, the payment of which Brower assumed as a part of the consideration money; and Mrs. Powers has therefore a right of action against him, or his representatives, to make good the deficiency in question.

As to the question of infancy, I will just state the dates of the several transactions.

The conveyance to the defendant is dated June 20, 1856, acknowledged August 5, 1856, recorded October 23, 1856. The conveyance by the defendant to John Brower is dated January 21, 1857, acknowledged March 21, 1857, recorded April

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9, 1857. In June, 1860, the defendant herein, was personally served with summons and notice of object of action, and appeared by attorney in the foreclosure suit. A sale was had therein August 14, 1860, and a judgment for deficiency against Walsh, docketed September 8, 1860, for \$1,504, and on the 19th of December, 1866, this deficiency appears to have been settled by the plaintiff in this action for and on account of Walsh who, on that day assigned to the plaintiff herein, his claim against the defendant herein.

I do not consider the proof conclusive as to defendant's infancy, the witness on that point is the defendant's mother. She says: "I think the defendant was born in 1837, and I have always kept her birth day 31st March. I had a record, but it was destroyed by fire when I was burnt out a year or two after my husband's death. He has been dead twenty-five or twenty-six years; Millie (the defendant), was my fourth child, she was sixteen years of age entering her seventeenth year when married, which was January 18; but don't recollect the year. I had five children. The second child was born in 1832, in the cholera season, that is what makes me recollect. I have with some doubt, however, given the defendant the benefit of a finding that she was not of the age of twenty-one years.

But this question of fact is not so important if we refer to the subsequent acts of the defendant in conveying the premises with warranty of title, and taking the purchaser's covenant to assume the mortgage, and to save harmless the defendant; also the appearance of the defendant by attorney in the foreclosure suit, after being personally served with the summons and notice of the object of action, and no question of infancy being raised. In all this there is sufficient proof of affirmance. Moreover there should be a restitution by the defendant of the consideration received, in order to avoid the liability entailed by the contract. The estate and proceeds thereof cannot be retained without performance of the obligation sought to be enforced. This is the uniform rule.

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(*Henry* agt. *Root*, 33 N. Y. R. 531, and cases cited; *Lynde* agt. *Budd*, 2 *Paige*, 191, and *Kitchen* agt. *Lee*, 11 *Paige*, 107.) Judgment should be entered for the plaintiff according to the prayer of the complaint, with costs.

N. Y. SUPERIOR COURT.

JOHN GARVEY, plaintiff agt. JOHN G. CAREY, defendant.

In an action upon an award of arbitrators, an *answer* which seeks to avoid the award on two grounds, to wit: 1st. Misconduct on the part of the arbitrators, and 2d. Mistake in ascertaining the amount due from the defendant to the plaintiff, is sufficient as a defense, on demurrer.

Special Term, January, 1868.

DEMURRER to answer.

The action is upon an award of arbitrators. The submission was "to settle all accounts and differences between said Garvey, growing out of and relating to five certain buildings erected on the southwest corner of Fiftieth street and Sixth avenue, in the city of New York. Said settlement to be governed and founded on a certain agreement made and entered into by and between said Carey and Garvey, bearing date the 23d day of January. 1867."

Upon such submission, the arbitrators made an award "that John Garvey is entitled to receive from John G. Carey the sum of five thousand one hundred and twenty-five 60-100 dollars, as his share of the profits derived from said buildings; *cash advanced by Carey to Garvey to be refunded by said Garvey.*"

To the complaint the defendant answered:

First. That the arbitrators, after first notifying the parties to appear before them, and after having partly heard the allegations of the defendant, proceeded irregularly and illegally, without notice to the defendant, and without fixing

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any day for the hearing of the matters submitted, and made their award before the case was finally submitted to them, and before the defendant had concluded his proofs and allegations before them.

Second. That the arbitrators, in computing the amount of profits to which each party would be entitled under the agreement, made a mistake in such computation, which mistake was a clerical error, and that the award was the result of such clerical error.

The demurrer was to the sufficiency of the answer as a defense.

G. C. GENET, *for plaintiff.*

NELSON SMITH, *for defendant.*

MONELL, J. The answer in this case is, I think, sufficient both in substance and form. The defendant seeks to avoid the award on two grounds, namely, misconduct on the part of the arbitrators, and mistake in ascertaining the amount due from the defendant to the plaintiff.

Such grounds were always sufficient to vacate and annul an award (*Herrick* agt. *Blair*, 1 *Johns. Ch. R.* 101; *Van Cortlandt* agt. *Underhill*, 1 *Johns. Ch. R.* 405; *Bouck* agt. *Wilber*, 4 *Johns. Ch. R.* 405; *Knox* agt. *Symmonds*, 4 *Ves. Jr.* 369; *Comeforth* agt. *Geer*, 2 *Vern. R.* 705), and may now be set up as a defense to an action upon the award (*Dobson* agt. *Pearce*, 12 *N. Y. R.* 156; *N. Y. Cen. Ins. Co.* agt. *Nat. Pro. Ins. Co.* 14 *N. Y. R.* 85.)

The misconduct complained of was in proceeding without notice to the defendant, and without fixing any day for the hearing of the matters submitted, and in making the award before the case was finally submitted to the arbitrators, and before the defendant had concluded his proofs.

If the defendant shall be able to sustain these charges of misconduct by proof, I think he will make out a strong case against the validity of the award, and be entitled to have it

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set aside. The charges of misbehavior are stronger than in any of the cases to which I have referred.

The second defense demurred to, of mistake in the computation made by the arbitrators, is a little indefinitely stated. It does not appear what the nature of the mistake was, except that it is alleged it was a clerical error. I think, however, it is sufficient in form, and proof may be given under it of such a mistake as the court will recognize as sufficient to vacate the award.

The disposition I have made of the demurrer renders it unnecessary for me to determine whether the complaint states a cause of action.

The defendant must have judgment on the demurrer, with costs.

N. Y. SUPERIOR COURT.

WASHINGTON RITTER, respondent agt. JAMES S. CUSHMAN
and REGIS C. GIGNOUX, appellants.

In the absence of any agreement that a *stock broker* may sell without notice, when stocks fall in price so that the margin does not cover the difference between current rates and the price paid, it would be a breach of good faith and common honesty to allow the owner's property to be sacrificed, without giving him an opportunity to increase his margin and hold the stock for a favorable change in the market.

The findings of a judge, who hears the trial of a cause, upon questions of fact, are conclusive, under the same rule that the findings of a jury or a referee are conclusive upon that question.

General Term, January, 1867.

THE defendants appeal from a judgment entered upon findings made by the chief justice of this court, of law and fact, after hearing the case without a jury; to which findings and each of them the defendants except.

A. J. PERRY, *for appellants.*

ALBERT MATTHEWS, *for respondent.*

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By the court, GARVIN, J. The principal objections, as presented upon the argument, and as I understand now to be insisted upon, are questions of fact.

The defendants insist: (1.) That the plaintiffs failed to prove that the defendants agreed to hold and carry the stock for the conversion of which this action is brought. (2.) That there is no proof of want of authority to sell the stocks, but, on the contrary, the defendants claim there was evidence of authority to sell. The stocks so alleged to have been converted by the defendants were two hundred shares of the New York and Erie Railway Company and one hundred shares of the Michigan Southern and Northern Indiana.

The chief justice found in substance as follows: (1.) That the defendants made agreements with the plaintiff and his son respecting the purchase and sale of stock and securities on account of the plaintiff. (2.) That in pursuance of such agreements, the defendants purchased and held two hundred shares of Erie for plaintiff, and that the remaining one hundred shares of Michigan Southern and Northern Indiana were transferred to the account of the plaintiff, and thereafter held by defendants for them. (3.) That the defendants sold the whole three hundred shares without authority from or notice to the plaintiff, or any default on his part.

Upon the question of an agreement to carry the stock for the plaintiff, both parties say there was an agreement so to do; but no length of time is proved. This cannot be necessary, there being no notice to the plaintiff that the margin was too small, or that defendants felt insecure. Clearly, before any sale of the plaintiff's stock was made, he should have had notice of defendants' intention to sell. Doubtless, parties may agree that the broker may sell without notice, when stocks fall in price so that the margin does not cover the difference between current rates and the price paid. But, in the absence of any such agreement, it would be a breach of good faith and common honesty to allow the plaintiff's property to be sacrificed, without giving him an opportunity

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to increase his margin and hold the stock for a favorable change in the market. I know it is said that fluctuations in the stock market are so sudden and unexpected that there is not time to give notice; but these abrupt transitions in the value of stocks are and have been well known for many years, and should be provided for by brokers and those with whom they deal. If no such provision is made, parties must abide by the rules of law. We think the findings of fact are sustained by the evidence. Much of the evidence is conflicting; especially upon the question of the unauthorized sale of the stock. This question of fact was passed upon by the judge who tried the case, and found for the plaintiff. His decision is conclusive—as much so as if found by the verdict of a jury. The rule stated by Judge SANDFORD is, “where there is testimony on either side sufficient to warrant a verdict, if standing alone, we are not at liberty to overturn the verdict for the reason that there was counter-testimony on the other side, even if it be apparently equal in point of weight.” There must be a preponderance against the finding so great as to show a case of mistake, passion or prejudice. (1 *Sandf.* 262.)

Again, the report of a referee, like the verdict of a jury, in a case of conflicting evidence, is conclusive as to questions of fact. (*Hoagland and others agt. Wight*, 7 *Bosw.* 394; *Davis agt. Allen and others*, 3 *Comst.* 168.) I see no reason why the same rule should not be applied to the findings of a judge who takes the testimony, sees and hears the witnesses, and is quite as well able as a jury or referee to come to a correct conclusion upon the facts. There is no question made upon the rule of damages adopted by the court.

It is, therefore, plain the stocks belonged to the plaintiff, and were sold without authority; that the defendants converted them, and are liable for the damages.

The judgment should be affirmed, with costs.

Hunt agt. The Michigan Southern, &c., Railroad Co.

COURT OF APPEALS.

FRANKLIN W. HUNT, respondent agt. THE MICHIGAN SOUTHERN AND NORTHERN INDIANA RAILROAD COMPANY, appellants.

In an action against a common carrier for damages arising from injury to property, where there is no question of law, but the only question arising in the litigation is one of fact, the judgment of the court below will be affirmed.

September Term, 1867.

APPEAL from the New York common pleas.

The action was for injury by the negligence of the defendants to the medical library of the plaintiff, which was delivered to them as carriers for transportation.

The books were received by the defendants, properly boxed, in perfect order, at Rolling Prairie, Indiana, on the 5th of April, 1854. In their receipt of that date they stated that they were to forward them to the plaintiff at Bergen, New Jersey, without further liability after railroad or lake shipment, or loss by fire.

The plaintiff, who is a physician residing in New York, after his return, went to Bergen, from time to time, for the property, but could get no account of it. At length, some three weeks after the delivery to the defendants, he found the boxes at Jersey city, in the depot of the New York and Erie Railroad Company. They were dry and in apparent good order. He paid the freight and took them home; when, upon opening the boxes, he found that the contents had been wet, that the books had been soaked through, and that the injury had occurred so long before that the bed clothes boxed with the books were all mildewed. The property was damaged to the extent of \$150.

The defendants gave no evidence to exonerate themselves from the imputation of negligence on their own road, nor to explain what was done with the boxes during the three days

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which intervened between their shipment at Rolling Prairie and their delivery to the next carrier at Toledo. The appellants introduced the receipt of the Cleveland and Toledo Company, dated on the 8th of April, covering a large amount of property, in which this was included, and describing the whole as in good order and condition. It did not appear, however, that the goods were examined at all, or that they were in good order in fact. The marine court, upon these facts, held that the damage was due to the defendants' negligence; and the judgment was affirmed on appeal to the New York common pleas, the opinion of the court being delivered by Judge DALY.

CHARLES TRACY, *for appellants.*

WM. W. NILES, *for respondent.*

PORTER, J. There is nothing in the evidence to justify the claim that the property was injured after it passed from the custody of the defendants. The mildewed condition of the blankets indicated that the goods were drenched at an early stage in their transportation. If the fact was otherwise, the appellants had the means of proving it. They furnished no explanation of the detention of the property for three days on the way from Rolling Prairie to Toledo, and it is fair to infer that the injury occurred within that period. This inference is not repelled by the circumstance that they procured a third party to sign a receipt, without examination, describing the packages as in good order on their re-shipment at Toledo. This simply confirmed the evidence of the plaintiff, that there was nothing in the exterior appearance of the boxes to indicate the damaged condition of the contents. The question was one of fact. No error of law was committed on the trial, and the court below was right in affirming the judgment.

All the judges concurring.

Judgment affirmed.

Taylor agt. Ketchum.

N. Y. SUPERIOR COURT.

JOHN M. TAYLOR agt. MORRIS KETCHUM, and others.

Where *coin and securities* are purchased by a *broker* for and held by him for his principal, under an agreement, for a valuable consideration, to carry the securities beyond a certain time, and to hold and not to sell the coin under a specified sum, the *title* to the coin and securities remains in the principal; and if the broker sells them contrary to the agreement, without notice of the time and place of sale, he is liable in damages for a conversion of the property.

An offer to prove a custom or usage, that a broker buying stocks for his principal, need not preserve for delivery the indential stocks purchased, but it is sufficient to deliver or sell an equal quantity in value and amount of stocks of the same character; and that on failure of the principal to reimburse his broker, the latter may sell the stocks without notice of the time and place of sale, is not applicable to such a case. Such proposed proof is in contradiction of the contract, and clearly against the rules of law.

If the transaction is a mere loan of securities for the broker's use, a return of other stocks of like nature, kind and amount is sufficient.

In an action to recover damages for the conversion of the plaintiff's property, which is gold coin, the measure of damages is properly reached by fixing the value of the coin in currency; and this is the highest market price of the coin converted, between the time of the taking and that of the trial.

General Term, October, 1867.

This case comes up on exceptions directed to be heard in the first instance, at general term, and on appeal from an order denying a new trial at special term. The plaintiff's action is brought to recover damages for the conversion by defendants of securities, consisting of United States bonds placed in the defendants' hands by the plaintiff to be taken care of by them, and for selling gold coin placed in their hands to be sold when it reached a certain price; alleging that defendants sold the gold for less than they were instructed to receive therefor in currency, thus violating the plaintiff's directions.

The particulars of the plaintiff's causes of action are set forth in his complaint, in four distinct specifications; the second was dismissed upon the trial. The first is, that in April, 1864, through C. L. Sailsbury, the plainiiff deposited with the defendants the sum of \$10,000, and directed the

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purchase of United States stocks to the amount of \$100,000, upon the defendants' agreement to hold or carry such stock upon a margin or advance by the plaintiff of ten per cent so long as the plaintiff should desire; then alleges the purchase by the defendants of \$164,000 government stocks, to wit: \$114,000 of United States six per cent bonds of 1881, and \$50,000 of United States 7.30 notes; then charges and alleges sales in violation of an agreement to carry the bonds and notes indefinitely, and particularly beyond January, 1865; that United States 6's of 1881 were sold by defendants to the par amount of \$51,000, at the rate of 106½, on the 27th of September, 1864; and on the 18th of November, 1864, the defendants sold the par amount of \$50,000 of United States 6's of 1881 at 110, and \$1,300 of said bonds at 110½; and on the 22d of November, 1864, sold the said \$50,000 of United States 7.30 notes at the rate of 116½; that the market rates of the United States 7.30 notes on the day of the alleged sale of said \$50,000 of said notes, sold at 118; that the stocks of 1881 were on 7th of December and 1st of January, 1865, worth at the rate of 118, and the 7.30's during the time the defendants agreed to hold the same worth at the rate of \$126 65; that such sales were not for the fair market price; were in violation of the agreement to hold the said stocks after January 1, 1865, and without notice, right or lawful authority on the part of the defendants, to the plaintiff's damage.

Third. That in September, and before the 20th of October, 1864, the plaintiff deposited with the defendants \$77,565 in gold coin, in the city of New York, with instructions to hold and not to sell for less than \$250 in currency to \$100 in coin; to which instructions defendants agreed; that in violation of the instructions and agreement, without notice sold \$67,000 of the coin at less than \$250; on the 21st of October, \$40,000, at 208½, and \$7,000 at 208½; on the 22d of October, 1864, \$100,000 at 210½, and \$100,000 at 210½, and on the 9th of November, 1864, the balance of the gold

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coin was sold for \$250; that in the month of November, said coin was worth \$2.64 in currency, by which wrongful sales plaintiff lost \$45,000. The fourth count alleges a fraudulent conversion of the securities and coin to the use of the defendants. The answer of defendants admits: (1.) The co-partnership of the defendants doing business in the city of New York, under the firm name of Ketchum, Sons & Co.; (2.) Denies the causes of action set up in the complaint; (3.) Sets out an account stated, accord and satisfaction and ratification of all the acts of defendants by the plaintiff; (4.) A counterclaim for money paid, amounting to \$6,722.96, with interest from February 1, 1865. The reply puts the counterclaim in issue by a denial. The evidence shows the United States stocks and securities in the hands of the defendants were purchased for the plaintiff's benefit in the first place, evidently intended to be upon a ten per cent margin; but when the securities bought exceeded \$100,000, a new arrangement was talked of between the parties, for after the 10th of April, 1864, and the 15th of April, the purchase amounted to \$164,000, instead of the \$100,000, and finally, about the 12th of July, an arrangement was made by the defendants to hold the securities till after the 1st of January, 1865; the securities were sold in June, without notice to plaintiff, and no mention was made of the sale when the agreement to hold was made in July. Other evidence was given of the price of the securities in January, 1865. In regard to the gold, it appeared that the defendants received \$67,000 in gold coin, with instructions to hold the same for \$250; all of which was sold for less than that amount, contrary to instructions. The sum of \$10,565, which was sold at 250, is not in controversy, and no claim is made by the plaintiff for damages on account of that sale. There was in evidence accounts of the transactions sent to plaintiff by defendants, telegrams and letters passing between the parties directly and through Salsbury, their agent, containing instructions, directions and reports of transactions and remittances,

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from which the defendants claimed the plaintiff acquiesced in the disposition made of the coin and securities made by the defendants, with full knowledge of all facts; but the jury found specially upon this question against the defendants. The jury also found a general verdict for the plaintiff for \$45,901.63, and the court directed the exceptions to be heard in the first instance at the general term. Most of the exceptions taken upon the trial arise upon the exclusion of evidence and objections taken to the charge of the court, which sufficiently appear in the opinion.

F. N. BANGS, *for defendants.*

EDWARDS PIERREPONT, *for plaintiff.*

By the court, GARVIN, J. To sustain this action the plaintiff was bound to show title in himself to the securities and coin for the conversion of which it is brought. There was abundant evidence to sustain the verdict, provided that question is to turn simply upon the issues found by the jury. Upon the first question, that of title, the property either belonged to the plaintiff or the defendants, and it will hardly be contended that the defendants were the owners of the coin or securities. Irrespective of the defendants' lien thereon, there can be no doubt that the plaintiff was the owner and had the right to call upon the defendants at any time to deliver him the securities and coin upon payment of their commissions. They doubtless had a lien thereon for their advances, but beyond this they had no rights in the property of the plaintiff, except such as they possessed by virtue of any contract and arrangement between the parties. The defendants' letters, telegrams, notices, reports of sales, and demands for further margins, all proceed upon the theory that the coin and bonds belonged to the plaintiff, and were his property. We must therefore assume the title to both coin and securities was in the plaintiff, held by the defendants for him. Of this there was abundant evidence; in fact,

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it was not disputed, either as to the \$67,000 in coin, or the \$114,000 United States bonds.

There is evidence that the gold was to be held for 250 in currency, and there is also evidence of an agreement to carry the bonds until after the 1st of January, 1865, and there is no evidence in the case contradicting it; if there had been, that question is settled by the verdict. It is not disputed that the bonds were sold by the defendants in September and November, 1864, for prices ranging from 106½ to 110–110½, and that on the 7th of December, United States bonds were worth 118. Thus there is proof tending to show the title to the property in the plaintiff both as to the coin and bonds. (2.) Sale of the property—of the coin for less than 250, and of the bonds before the 1st of January, 1865. Upon this evidence alone without anything else, it would present a clear case of title in the plaintiff and conversion by the defendants, for which he would be entitled to damages, provided the sales were made without authority from the plaintiff. Of this authority there is no evidence in the case.

As to the bonds, the question of notice to the plaintiff of time and place of sale has nothing to do with the case, if the defendants agreed to hold the bonds till after the 1st of January, 1865. Nor as to the coin, if the instructions to hold the coin for 250 were binding upon the defendants. In such case whether there was a notice of time and place of sale or not is of no importance, unless the plaintiff authorized it before the sale or ratified it afterwards. Of authority to sell there is no proof, and the jury have expressly found the plaintiff did not acquiesce in the disposition made by the defendants of the coin or securities, with full knowledge of all the facts relating thereto.

This brings us to the objections and exceptions taken by the defendants: (1.) To the rulings of the court in receiving and excluding evidence. (2.) Denying the motion to dismiss the complaint, and (3.) exceptions to the rulings of the court in connection with the charge to the jury. Without

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going over in detail each particular exception taken by the defendants to the exclusion of evidence offered, to the admission of that received, it is apparent that the same questions of law are presented, substantially, by the exceptions taken to the charge of the court, with one qualification, and that pertains to the evidence of custom and usage, which was offered and rejected. It will, therefore, only be necessary to pass upon the exceptions taken to the charge; to determine all the questions presented for review, holding, as we do, that the motion to dismiss the complaint was properly overruled, and that the several motions to compel the plaintiff to elect upon which count, transaction or cause of action he would proceed, were rightly disposed of. (*Lansing agt. Wiswell*, 5 *Denio*, 213.)

Upon the exclusion by the court of the evidence of custom and usage, the courts have held that usage is not admissible to contradict the contract, and that no usage is admissible to control the rules of law (34 *N. Y. R.* 417; 16 *N. Y. R.* 393). The admission of the evidence would have been a violation of both these principles. The contract proved was to carry the bonds which the defendants held for the plaintiff, and as defendants' security for their advances and commissions until after the first of January, 1865. Defendants sold before that period, without notice of the time or place of sale.

The offer was to prove a usage that a broker buying stocks for his principal need not preserve for delivery the identical stocks purchased, but it is sufficient to deliver or sell an equal quantity in value and amount of stocks of the same character; and that on failure of the principal to re-imburse his broker, the latter might sell the stocks without notice of the time and place of sale. If the transaction had been a mere loan of securities for the defendants' use a return of other stocks of like nature, kind and amount would be sufficient; but where stocks or securities are held as security for advances, the rule is different. In such case the title to the

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security remains unchanged. That is the rule as established by the courts (*Dykers* agt. *Allen*, 7 *Hill*, 497). The proof offered of custom and usage, authorizing a sale of stocks on failure to re-pay advances, without notice of time or place of sale, was properly excluded. This has been so often held that it hardly needs the citation of authorities to sustain it. If the broker desires to possess himself of this power he must make an agreement that shall permit him to do so. Upon both these propositions we think the rulings of the court should be sustained (*Dykers* agt. *Allen*; *Chase* agt. *Prime*, 4 *Johnson's Ch. Rep.* 490; *Wheeler* agt. *Newbould*, 16 *N. Y. R.* 392). The proposed proof of usage was in contradiction of the contract, and clearly against the rules of law (*Bowen* agt. *Newell*, 4 *Selden*, 190; *Merchants' Bank* agt. *Woodruff*, 6 *Hill*, 176; and cases cited by Mr. Hill; *Higgins* agt. *Moore*, 34 *N. Y. R.* 417).

It is also quite plain that if there was an agreement to carry the bonds till after January, 1865, their sale was unauthorized; and whether there was such an agreement or not, a sale without notice of time or place was unauthorized either by the terms of the contract as proved, or by the rules of law. All the questions of fact were put to the jury after stating the theory of the plaintiff's case. Upon the facts, the court say: If you find the facts to be in both cases (meaning coin and securities), as plaintiff claims, he is entitled to such damages. It is true the court instructed the jury that the plaintiff put the securities into the hands of the defendants to be held for their advances, but this was upon the uncontradicted evidence of the case, and was perfectly proper (20 *N. Y. R.* 126); but upon the question of what the contract was as to instructions in regard to holding the coin and appropriating the securities, the question of fact was expressly submitted to them. Upon the other exceptions taken to the rejection and admission of evidence, we think the rulings of the court should be sustained.

Second. Several exceptions were taken to the charge, some

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o which are already disposed of by the views thus far taken of the case; those remaining to be considered are: (1.) It is claimed the court erred in withdrawing from the jury the first question in writing submitted to their consideration. The submission of the question in this form was purely discretionary. The language of the Code is "the court may direct the jury to find a special verdict" (§ 261). It was of no importance whether done or not, and its withdrawal from their consideration furnishes no ground of exception. Both questions might have been withdrawn without harm to either party before the jury had agreed upon their verdict.

It is not like the case of issues framed by the court, sent down to the circuit for trial, upon which special findings are required upon specified issues. The court withdrew the first question in writing from the consideration of the jury, and instructed them they need not answer it. This, we think, the court had the right and power to do, and was purely a matter of discretion over which we have no control. Thus far this is a case of a breach of both contracts by the defendants, in regard to the coin and the securities, and therefore a breach of duty in violating the agreements, and a conversion of the property to the defendants' use, resulting in loss, by the plaintiff, of large gains and profits in the sale thereof, had the coin and securities been held as directed by the plaintiff and agreed to by the defendants. The only remaining question is one of damages. The court adopted the rule laid down in *Scott agt. Rogers* (31 N. Y. R. 676), which was more favorable to the defendants than that afterwards promulgated by the same court in *Borst agt. Dutcher* (34 N. Y. 493.) Certainly, whatever the rule is, if there is any difference in the two cases, the defendants have no cause to complain, as the rule laid down on the trial is most favorable to them. This disposes of the question of damages in regard to the conversion of the bonds.

But other objections and exceptions are presented regarding the transactions in gold. (1.) To the admission of the

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evidence fixing the value of coin in currency, and adopting that price as the measure of damages in the charge of the court to the jury. We think the rulings of the court were right.

The court of appeals simply holds that treasury notes are a legal tender in payment of debts between private persons (27 N. Y. R. 400); and that a mortgage which, by its terms, is payable in gold or silver coin, may be paid in United States legal tender notes, and that such notes are the lawful money of the United States. (*Rodes* agt. *Bronson*, 34 N. Y. 649.)

This action is not brought to enforce the payment of a debt, but to recover damages for the conversion of the plaintiff's property.

A judgment may be paid in treasury notes, and the plaintiff cannot demand gold or silver therefor. How is the plaintiff to obtain indemnity for his loss, unless the value of the coin, in currency, is made the measure of damages? There never may be a time after the trial when coin would bring the same price it would before. Any other rule would work great injustice.

The rule of damages is the highest market price of the property converted, between the time of the taking and that of the trial. (34 N. Y. R. 493.) This market price, recovered and put in judgment, becomes a debt. The defendants may pay and satisfy it by the tender and payment of treasury notes. The plaintiff cannot demand gold or silver coin in payment of his judgment, but must take the treasury notes. We must, therefore, in view of the case of *Metropolitan Bank* agt. *The Shoe and Leather Bank* (27 N. Y. R. 400), hold that the rulings of the court were right in receiving the evidence and submitting the question of the value of the coin to the jury.

There were some other exceptions, none of which were well taken.

Entertaining these views, the exceptions taken by the

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defendants should be overruled, and a judgment entered for the plaintiff with costs, and the order denying a new trial should be affirmed with costs.

McCUNN, J. The principal questions in this case to be disposed of by the court are:

First. Was there an agreement on the part of the defendants to carry the securities placed in their hands by the plaintiff until the 1st of January, 1865?

Second. Did the defendants render to the plaintiff accounts of the disposition of such securities and gold, which accounts showed a balance in defendants' favor, and in which the plaintiff acquiesced, after the accounts were rendered, with a full knowledge of all the facts relating thereto? And did the rendering amount to an account stated between the parties, so as to bind the plaintiff?

The rulings of the court, and the points raised by the parties to the action during the progress of the trial, being of secondary importance, I shall hastily touch thereon.

In considering the first question, the only doubt presented is, whether the learned chief justice was justified in withdrawing that question from the jury. I think he was; for the facts as to that question were so clear and uncontradicted that it did not require the action of the jury to pass upon them so as to enable the court to apply the law. The witness Salisbury testifies, at folio 38, that the defendants were to purchase and carry stocks for the plaintiff, and at folio 75 he says the agreement was to carry them to the 1st of January; and the clear instructions to be found in the letter of plaintiff to defendants, of the 17th of October, 1865 (Ex. 14), were to the effect that all the gold bought for plaintiff, and that sent by plaintiff to defendants, should be held until it reached 250. And it will be observed that these instructions were reiterated from time to time, until all the gold was placed in the hands of defendants, to be carried by them for plaintiff. I cannot find a tittle of proof in the case to the

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contrary of this. It is true, the counsel for defendants claim that out of the lengthy correspondence by letters and telegraph there is evidence going to show that no agreement was made to carry the gold and securities until January, 1865, but that we must impliedly take it, no such understanding, as to carrying into January, existed. I can see no implied agreement in such letters and telegrams to vary the former express contract on the part of the defendants to carry the United States bonds and the gold. The parties had a long running account between each other, on the one side as bankers here, on the other as bankers in St. Louis, dating long before this special agreement and continuing to the time when the dispute about the sales arose. And it was concerning this account that the letters and telegrams were sent and received; and whenever the letters, or telegrams, or accounts, related to the gold and bonds in dispute, they simply related to them as they were held as collateral securities, or as pledges, given by plaintiff to defendants, to secure other banking transactions. Those letters and telegrams were never intended as authority from plaintiff to defendants to sell the bonds and gold without the proper notice and demand required in all cases where pledges of the like kind are made. Indeed, the learned chief justice, in his charge, said that the defendants had no other rights than those of ordinary pledgees, without any special rights, and in that instruction he is justified in a series of decisions, which must be recognized as the law on the subject. (*Willard's Eq. Jur.* 456, and the numerous cases cited therein.)

In all pledges, before a sale takes place, there must be a demand, and that demand must be seasonable in time, and there must be a notice of the sale. Now, in this case, it is conceded there was no notice or demand, neither was there waiver of such notice or demand; yet, without the one or the other, defendants had no right to sell the securities. In *Wilson agt. Little* (2 N. Y. R. 443), it was held that a waiver of notice was not a waiver of demand; and in the case of

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Genet agt. *Howland* (45 *Barb.* 560), it was held that notice was not equivalent to a demand.

In *Milliken* agt. *Dehon* (27 *N. Y. R.* 364), there was a consignment of cotton, and the consignor was to keep the margin good; and it was held that the consignee could not sell in that case; that he must demand the margin before selling. He had leave by contract to sell without notice, but that was not enough; demand was not waived. The question in that case was whether a demand was necessary, and the necessity was declared by the court.

In *Andrews* agt. *Clarke* (3 *Bosw. R.* 585), it was held that the plaintiff was not in default, so that the defendants had a right to sell, though they had given him notice that they anticipated a fall on a certain day; that the pledgee could not sell without the fall first occurring, and then giving him notice, so as to cut off his equity of redemption. And in *Merwin* agt. *Hamilton* (2 *Duer R.* 244, 251), the pledgees were held liable because they did not make demand of payment and give notice of sale.

In the case of *Durant* agt. *Einstein*, heard in August last (reported ante, p. 223), there is an opinion of this court, at special term, where all the above authorities are discussed, and where the court held that a party's property could not be sold at will, and without first making a demand upon him, and then giving him notice of the sale, in order that he may be enabled to prevent its being sacrificed. So that I think I have shown that the learned judge below was justified in withholding from the jury the question of the agreement to carry the gold and bonds for plaintiff, and that he was also justified in saying to the jury "that these parties (the defendants) are entitled to have applied to their dealings neither more beneficial nor harsher principles of law than other members of the community, and that the dealings of brokers in stocks or securities are not by their necessities or the customs they adopt taken out of the general rule. That a party who has chattels, or securities, or property of any

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kind, pledged to him for the payment of a debt, without some express agreement to that effect, has no other authority than what he derives as pledgee or mortgagee of that stock or chattel, and has no right to sell it without giving notice to the person who owns it of the time and place of sale, so that he may be enabled to raise the money by that time to take up the loan." There was no notice of time and place of sale, and therefore the sale was unwarranted.

The next question is, how far did the accounts rendered by defendants to plaintiff bind the latter, and did these accounts act as a bar to this action? It is claimed by defendants that they rendered accounts to plaintiff, in which they stated the sales of all the securities at certain prices and at certain times; that they rendered an account of certain sums of money which they have expended for him; and they claim that, taking into consideration all the circumstances, the relations in which the parties stood to each other, the communications by telegraph, by letter, and through Salisbury, it is clear that the accounts were rendered to plaintiff, with a full knowledge on his part of all his rights and all their liabilities, and that he accepted the balance that was therein set forth against himself, and thereby ratified all their acts in the disposition of his property. The plaintiff denies all this, and says that he never accepted said accounts as binding on him; on the contrary, that he never gave the defendants color of authority that would lead them to suppose that he had, by receiving these accounts, ratified or sanctioned their acts in the premises. On this second question, there was testimony on both sides, and the court left it for the jury to say which side was correct in its assertions, and the jury found for plaintiff. I therefore hold on this point that the jury's findings in this respect must be final and conclusive.

The less difficult and less important questions, such as the ruling on evidence, the charge of the learned judge, and the

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request to charge, I think I can show to have no virtue in them.

As to the motion on the part of the defendants' counsel, asking the court to charge forty-two separate and distinct propositions, a large number of them being mere repetitions of former requests; these requests were presented in a body, and I hold that it is not the duty of the court to undergo the labor of considering them together. On the contrary, the counsel should have submitted and read each proposition separately and in detail, so that the court would have been enabled to deliberate and pass upon each distinct proposition. I hold, therefore, the rule to be that each proposition, or request to charge, should be distinctly and separately made; and a refusal on the part of the court to charge these forty-two propositions in bulk, other than as he had charged, is not error.

Next, as to the charge: A general exception to a charge, as in this case, taken after the charge was delivered, is not specific enough to raise or present any question for reversal. (*Newell* agt. *Dolby*. 33 N. Y. R. 85; *Jones* agt. *Osgood*, 2 *Seld.* 233.)

"It is the duty of counsel to point out, at the time, in what respect the charge did not conform to the requests; and it is not the duty of the court, by comparing every portion, to see if there is a discrepancy. Perhaps, if attention had been called to the precise point of which complaint was to be made, it would have been corrected. The party complaining *must put his finger on the point* of which he complains." (*Jones* agt. *Osgood*, *supra*.)

Last. The court committed no error in ruling on the evidence. The objection to the letter of Salisbury was not well taken, because defendants had not first inquired about such communication. It was right, therefore, to have the subject matter exhausted.

The agreement was a positive undertaking on the part of the defendants to carry certain specific securities, and to

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carry gold, until its price advanced to 250; and, as the custom of brokers, even if admitted, could not vary a positive agreement, the custom was properly ruled out. The custom of brokers, in not preserving the identity of stocks purchased by brokers for parties, was immaterial, because even the substituted securities, which defendants were said to have supplied for plaintiff, were sold without demand or notice.

Judgment should be affirmed, with costs.

SUPREME COURT.

DANIEL S. READ, appellant agt. WILLIAM B. JAUDON and another, respondents.

Where one joint owner of stocks brings an action against *stock brokers* for the profits arising on three specified sales of such stocks, amounting to a certain sum, and it turns out on the trial that all the dealings with the brokers in reference to such stocks were had with the *other joint owner*, and the defendants never knew the plaintiff, or that he had any interest in such stocks, and that the defendants' accounts were all kept in the name of such other joint owner:

Held, that the plaintiff, nevertheless, could maintain his action and recover against the defendants, where it appeared that the plaintiff had purchased the interest of his co-owner or special partner in the transactions, before suit brought, and such transfer was averred in the pleadings.

The purchases and sales of such stocks, being in fact for the joint benefit of the plaintiff and his assignor, as between themselves, were none the less on their joint account because the orders were by the assignor alone, without any disclosure of the plaintiff's interest.

If, therefore, it be conceded that there was a certain sum due from the defendants on the claim assigned by the assignor to the plaintiff, as to which there was no dispute, the mere fact that it was the assignor's individual claim, instead of a joint claim with the plaintiff, should not put the latter to a new suit; as it could make no difference to the defendants to whom they made payment, and the transfer to the plaintiff would protect them against any future claim by the assignor.

But it does not follow that the plaintiff is entitled to recover the sum thus ascertained as profits, because it turns out in point of fact that he had an interest in such profits jointly with his assignor. He cannot isolate these items of profits from the assignor's *general account*, and recover them, simply for the reason that he had *no interest in the other transactions* going to make up the whole account from which losses resulted.

The defendants having been permitted and induced to act and deal with the assignor,

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in ignorance of the plaintiff's interest or rights in the transactions, may insist that the entire dealings shall be closed, as if the assignor only had been interested; that is, they may insist upon all equities existing between the defendants and the plaintiff's assignor alone, as regards the entire dealings, and the plaintiff can recover only such sum as shall appear to be due the assignor on balancing the account.

If an objection is taken, that no such set off or equities are stated in the defendants' answer (which probably is not necessary), an amendment would meet the difficulty, and ought at once to be allowed, with a view to substantial justice.

General Term, Fourth District, 1868.

Before BOCKES, POTTER, JAMES *and* ROSEKRANS, *Justices.*

IN the month of March, 1865, the plaintiff and Geo. Caldwell, Jr., purchased together two hundred shares of Cumberland coal stock and one hundred shares of New York Central Railroad stock. Geo. Caldwell, Jr., was to have one-half the profits for doing the business. The defendants did not know of this arrangement. The stock was purchased in the name of George Caldwell, Jr., alone. There was a profit of four hundred and ninety-two dollars and seventy-four cents on these stocks.

On the 28th of March, 1865, George Caldwell, Jr., assigned all his interest in such profits to the plaintiff in this action.

On March 28th, 1865, there was to the credit of said Caldwell in the hands of the defendants:

Balance from transactions before March 22.....	\$38 65
Profits on sale of 200 Cumberland Coal.....	369 57
Profits on sale of 100 N. Y. Central.....	123 17
	<hr/>
	\$531 39

But no notice of said assignment was given to the defendants until after April 6th, 1865, when the account had been rendered showing that the subsequent transactions of Caldwell in stocks had resulted in a loss of more than the entire profits due him at that time.

The complaint charges the purchase and sale of these three hundred shares of stock by the defendants, and that the profits were \$492.74, and demands judgment therefor.

The answer is a general denial only.

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The case was referred to Samuel Jackson, as referee, who found as a conclusion of law that the plaintiff was not entitled to recover, without showing that the stock was purchased by the defendants on account of the plaintiff and Geo. Caldwell, Jr., jointly.

The referee thereupon dismissed the complaint, and a judgment was entered for the defendants, from which this appeal is taken.

IRA D. WARREN, for plaintiff, appellant.

I. The tenth finding of fact finds distinctly that the two hundred shares of Cumberland Coal stock and the one hundred shares of New York Central stock were purchased for the joint benefit of Geo. Caldwell, Jr., and Daniel S. Read, the plaintiff.

This finding is fully sustained by uncontradicted evidence.

This testimony of the plaintiff and George Caldwell, Jr., is the only evidence upon that subject.

Therefore we say that the referee has found that these stocks were purchased jointly by the plaintiff and George Caldwell, Jr., and his conclusion of law is of course erroneous.

These stocks were purchased by the plaintiff and Caldwell, under an agreement between themselves to divide the profits.

If this is not a joint purchase, it is difficult to determine what would be. The profits belonged to them jointly, and that is what the suit is brought to recover. If it was not purchased *jointly*, then Read was entitled to a judgment for his half of the profits, viz., \$246.37.

II. The referee erred in holding that plaintiff is not entitled to recover without showing that it was purchased on his and Geo. Caldwell, Jr.'s, joint account.

On the 28th of March, Geo. Caldwell, Jr., assigned, by an instrument *under seal*, all his interest in these profits to the plaintiff. The assignment states that the thing assigned is "*the profits on these two hundred shares of Cumberland Coal and one hundred shares of New York Central stock.*" Whether it was a joint or several interest, the assignment conveyed it all to Read.

This gave the plaintiff the entire interest of Caldwell in the profits, whatever they were.

Therefore the referee erred in holding that plaintiff could not recover without showing that the stock was purchased on their joint account.

There is no counter-claim or other equities set up in the answer against Caldwell, and none was proved, and therefore it is of no consequence whether or not the defendants knew of the arrangement between Read and Caldwell. The assignment of all Caldwell's interest in this stock, which he supposed to be joint, is good for whatever interest he had in it. (*Hicks agt. Wetmore*, 12 *Wend.* 548; *Taintor agt. Pendergast*, 3 *Hill*, 72; *Van Lien agt. Byrnes*, 1 *Hill*, 133.)

There is not a word of evidence showing that Caldwell owed them a cent. If they had any claim against Caldwell, they should have set it up in their answer and have proved the amount of it, and then the plaintiff might have been called upon to show that they had notice of his interest in this claim, and he would have done so.

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III. The referee erred in finding, in the fifth finding of fact, that Caldwell was *indebted to the defendants for loss on stocks, they having advanced the purchase money on the purchase thereof.*

There is not a single word of evidence to support any such finding. There is not a word of evidence that Caldwell owes them a single penny. There is not a word of evidence that the defendants advanced one penny of the purchase money for these stocks. It is not pretended in the answer that Caldwell owed them a cent, or that they had any claim against him. The referee admitted evidence, under objection, of losses, and the purchase and sale of other stocks, "*for the purpose of showing a motive for putting these in their joint names.*"

We were unable at the time, and now are, to determine what motive it tended to disclose or develop, or what bearing it could have on the issue; but it appears that the referee has *assumed* that the losses were not paid, and he has used the evidence admitted to show a motive as a foundation upon which to find a fact that the defendants in their answer don't pretend exists, viz., that Caldwell is indebted to the defendants.

The referee erred in admitting this testimony for any purpose.

IV. The sixth and seventh findings of fact are directly in conflict with the tenth, and neither of them is warranted or supported by the evidence.

Caldwell swears, and the plaintiff swears, that these three hundred shares of stock were purchased by them and for their joint benefit, and that each one was to have half of the profits, and nobody contradicts it.

The only other fact which appears, and which the referee has found, is that the defendants did not know that they purchased the stocks for the benefit of Caldwell and the plaintiff jointly.

It is difficult to see what effect that could have on this case, as long as it is not pretended that they have any claim against Caldwell, in whose name the stock was bought.

V. There are several exceptions to the admission of testimony taken by the plaintiff, which we do not propose nor think it necessary to discuss, except that we claim the referee erred in admitting every question to which we have taken an exception.

We ask, in case a new trial is granted, that the order of reference in this case be vacated. (*Murphy* agt. *Winchester*, 35 Barb. 616, 620; *Sharp* agt. *Mayor, &c.* 31 Barb. 578; 1 *How.* 193; 13 *How.* 82.)

VI. Judgment should be reversed and a new trial ordered.

SAMUEL JACKSON, *for defendants, respondents.*

I. The finding of the referee herein, that the purchases of the stocks mentioned in the complaint, and their subsequent sale, by the defendants, were made, so far as they, the said defendants, were concerned in the transaction, wholly for the benefit and on the account of the said Caldwell, was correct, and should be sustained.

II. The findings of the referee on questions of fact, where there is a conflict of testimony, must be sustained, unless such findings are clearly against the weight of testimony.

Caldwell swears he told W. B. Jandon to purchase the two hundred shares Cumberland; that his uncle, the plaintiff, would furnish him with the money and allow him half the profits for transacting the business, and that this was the basis on which the order for the purchase of the two hundred Cumberland Coal rested. W. B. Jandon denies this, and produces the said Caldwell's individual order in writing, which he, Caldwell, admits was given after the conversation alleged to have taken place,

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and before the purchase of the stock. The order for the purchase of the one hundred shares New York Central was in writing, along with an order for a purchase which is admitted by him to have been on his own account, and he nowhere states that there was any notice to the defendant, at any time, that this was a joint transaction, and even when he requested a splitting of the account, for the purpose of settling with the plaintiff, no mention was made of the one hundred shares N. Y. Central.

The referee rightly found that defendants had no notice of any joint interest between Caldwell and Read, there being but one witness on plaintiff's side as to the verbal notice of joint account, who swears it was in the presence of three persons, two of whom, on defendants' side, swear that it never took place; and the other portion of the conversation is proved to be false by the production of the written order for the purchase of the stock.

The order for the New York Central is shown to have been only in writing, and made by Caldwell in his own name, as appears from the testimony for the plaintiff. Even if the referee believed that the conversation referred to took place, the subsequent written order without any limitation must control in the transaction.

III. A secret agreement between two or more persons will not be allowed to work an injury to third parties transacting business with one of them, which relates to the subject matter of such agreement.

IV. Good faith requires that, where a person dealing generally on his own account with another, undertakes to transact similar business with such person on the account of a stranger to the general business, full and due notice should be given of such special transaction; and where agency is afterwards alleged as to items where all transactions have been to all appearances on individual account fraud will be presumed, if any loss would arise therefrom to such second person.

V. That the referee held correctly in admitting testimony as to transactions between the said Caldwell and defendants, by means of which the amount due said Caldwell on March 28th, 1865, was again expended on his account and at his request, prior to the notice of the assignment.

VI. That the referee found correctly, as a conclusion of law, that, as the complaint declares, upon a transaction in which the plaintiff and Caldwell were jointly interested on the one side, and the said defendant on the other, and no proof was offered which would authorize him in holding that the defendants had notice of such joint account, therefore the plaintiff cannot recover.

(a.) As the transactions were in Caldwell's name, plaintiff must, in the absence of notice to the defendants, put himself in Caldwell's place; for this purpose the assignment is insufficient.

(b.) Were the assignment good, he can recover no more than Caldwell was entitled to when the first notice of its being made was given to defendants; and it is shown that then Caldwell was indebted to defendants.

(c.) There was sufficient evidence to throw great suspicion on the validity of the assignment for any purpose; it was made without consideration, evidently antedated for the purpose of working a fraud upon the defendants, and for an amount which the testimony shows was one in which plaintiff and Caldwell had no interest even under their original agreement, if any was ever made.

VII. That, if the evidence is sufficient to cast a reasonable doubt upon the good faith of the assignment, the referee was entitled to give the defendants the benefit of this doubt, in determining conflicting evidence, if all other things were equal.

VIII. That the testimony fails to show any joint interest between the said plaintiff and Caldwell, but only goes so far as to prove an agency on the part of Caldwell; but also shows that no notice that Read was principal in the two hundred

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Cumberland one hundred New York Central was ever given to defendants until after this relation had ceased to exist.

IX. That whatever relations may have existed between Read and Caldwell as between themselves, as Caldwell as agent mixed his principal's business with his own so as to be undistinguishable, and as neither he nor his principal gave any notice of such agency to the defendants, with whom he was dealing, the loss of his principals' money with his own, embarked in the general business, is one for which he, Caldwell, and not the defendants, is liable.

X. That the decision of the referee should be sustained, and the judgment be affirmed.

By the court, BOCKES, J. The defendants were brokers in the city of New York, and at the request and under the direction of George Caldwell, junior, they made purchases and sales of stocks, on some of which transactions profits accrued and others resulted in losses. All orders for purchases and all directions to sell were by Caldwell, and the account was kept in defendants' books in Caldwell's name. The defendants had no notice that any other person than Caldwell had or claimed to have any interest in the transactions, until the account was closed. How it then stood, whether the balance was in favor of Caldwell or the defendants, the referee has omitted to find.

The action is brought to recover the profits on three sales; which profits in the aggregate amounted to \$492.74, ignoring all other purchases and sales by the defendants on Caldwell's account. The right of action was made to depend on the averment, that the purchases and sale of these particular stocks, were on the joint account of Caldwell and the plaintiff. The referee finds and certifies the fact that the evidence fails to establish or show, that the purchases and sales of these particular stocks were for the plaintiff, and the said George Caldwell, junior, jointly or on their joint account, and he adds, "I find as conclusion of law, that the plaintiff is not entitled to recover in this action without showing that the purchases of the stock in question, were made by the defendants on the account of the plaintiff and George Caldwell, junior, jointly"; and further, that "this not having

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been shown, I find and adjudge, that the complaint of the plaintiff in this action, be dismissed," &c.

There is no dispute but that the profits on these three sales amounted to \$492.74, as was claimed. But the defendants insisted that the purchase and sales were for Caldwell, and on his individual account, and not on joint account of Caldwell & Read. The referee so found. But was that a defense of itself? Suppose it was so, it would present no insuperable difficulty to a recovery, all other difficulties being out of the way, inasmuch as Caldwell had assigned the claim to Read, the plaintiff; and such transfer was averred in the pleading. The objection then to a recovery would have been simply and only that the claim assigned to the plaintiff, was a claim of Caldwell alone, instead of a joint claim of Caldwell and the plaintiff. This would not afford a defense. At most it could be deemed a mere variance between the pleading and proof in no way affecting the merits, and which variance should be disregarded in every state of the case. If, therefore, it be conceded that there was in fact \$492.74 due from the defendants on the claim assigned by Caldwell to the plaintiff, as to which there was no dispute, *the mere fact*, that it was Caldwell's individual claim, instead of a joint claim belonging to himself and the plaintiff, should not put the latter to a new suit. It could make no difference to the defendants in case the demand was a valid and just one, to whom they made payment, and the transfer to the plaintiff would protect them against any future claim by Caldwell. It was therefore erroneous in this case to hold, as did the referee, that the plaintiff could not recover, simply because the demand assigned to him was originally the demand of assignor alone instead of one belonging to his assignor and himself jointly. If necessary an amendment of the complaint should have been made to meet the objection, which on the supposition that there was no other defense, was purely technical and without merit. There was not,

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however, any objection raised to a recovery on the ground of variance.

But the referee clearly erred in finding that the evidence failed to establish the fact that the purchases and sales, as regards the three transactions mentioned in the complaint, were made on the joint account of the plaintiff and Caldwell.

I think it clearly and indisputably appears that Caldwell and Read were jointly interested in the profits on the sales, to recover which profits this action is brought. I understand both of them to so testify, and their testimony stands uncontradicted, except by the fact that all orders and directions in regard to these transactions, were made by Caldwell alone, without disclosing Read's connection with them. But his silence in regard to Read, and the fact that all orders and directions came from Caldwell alone, are not in conflict with the undisputed evidence that Read was actually interested in the transactions. As to them he occupied the position of a silent partner, having in point of fact an interest, of which, however, the defendants were ignorant. Indeed the referee so finds in substance, if not in direct terms. In his *tenth* finding he says: "I find that Daniel S. Read and George Caldwell, Jr., agreed between themselves to purchase and sell together, said two hundred shares of Cumberland Coal stock and said one hundred shares of New York Central Railroad stock, and that George Caldwell, Jr. was to have half of the profits on such purchase and sale for transacting the business, and Daniel S. Read the other half; but that defendants had no knowledge of such agreement" (*fol.* 100). This finding of the referee is abundantly sustained by the evidence, and the case therefore shows that Caldwell & Read were jointly interested in the profits resulting from the sales of the stocks alluded to, the same having been purchased and sold in fact, for their joint benefit, the purchases and sales were none the less on their joint account, because the orders

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were by Caldwell alone, without any disclosure of Read's interest.

My conclusion then is, that the tenth finding of fact by the referee is correct, and that the seventh and ninth, wherein he finds that Caldwell & Read were not jointly interested in the profits resulting from the purchase and sale of these stocks are erroneous. But it does not follow that the plaintiff is entitled to recover the \$492.74 profits, because it turns out in point of fact, that he had an interest in such profits jointly with Caldwell. He cannot isolate these items of profits from Caldwell's general account and recover them, simply for the reason that he had no interest in the other transactions going to make up the whole account from which losses resulted. The defendants, having been permitted and induced to act and deal with Caldwell in ignorance of Read's interest or rights in the transactions, may insist that the entire dealings shall be closed as if Caldwell only had been interested. They may insist upon all equities existing between them and Caldwell alone, as regards the entire dealings, and the plaintiff can recover only such sum as shall appear to be due Caldwell on balancing the account. Read put Caldwell forward to act, or had permitted him to act for and in behalf of both, but in his individual name, without disclosing his true position. Those with whom he thus dealt had, and still have the right to hold him to the position he was permitted to assume, as regards any claim made by Read having its origin in these transactions. The case in this regard is like that of principal and agent where the agent is permitted to act and does act in his own name without disclosing his agency. In such case he may be treated as principal and the right of set-off and all other equities attach as if he were in fact the principal and alone interested in the transactions, and although the principal may step in and assert his rights he will be held to take the place of his agent, and to have no other rights than those which his agent could have enforced had he been principal instead of agent. (24

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Wend. 458; 2 *Kent*, 632; 26 *How.* 522-3.) In this case, therefore, the plaintiff should have been regarded as occupying Caldwell's place, and the examination of the dealings between him and the defendants should have been pursued further than seems to have been done on the trial, for the purpose of determining what sum, if any, remained due him on his account with the defendants. If the balance was against Caldwell on the entire account, the plaintiff could not recover. If in his favor a recovery could be had for such balance, not exceeding in any event, the profits on the three sales specified in the complaint. It seems that evidence was offered showing how the account stood, which was excluded on plaintiff's objection. In the view I take of this case, this evidence should have been admitted. But without it the plaintiff was clearly entitled to recover. So the plaintiff objected to its admission, and it was not considered in deciding the case, yet, notwithstanding it was ignored, the plaintiff was defeated whereas, such evidence being excluded or ignored, he should have recovered.

Perhaps it may be said that no set-off or equities in defendants' favor were set up in the answer. I am not prepared to hold that it was necessary to state in the answer in this case, that the claim in suit was part of a running account between the defendants and the plaintiff's assignor. If the evidence showed such fact, the plaintiff could not recover without showing a balance on the whole account, as I think. But however this might be, if objection should be made on that ground, an amendment would meet the difficulty, and it would be at once allowed with a view to the attainment of substantial justice between the parties. It is plain, I think, that the case was disposed of on a wrong theory.

The findings of fact so far as the referee has gone, seems well supported by the evidence, except the seventh and ninth, which, however, are corrected by the tenth. But the referee should have gone one step further and stated how the whole account stood between Caldwell and the defend-

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ants. This was necessary to the proper disposition of the case, and when seen what the judgment should be, would be very plain.

Judgment reversed; new trial ordered; costs to abide the event; reference discharged.

SUPREME COURT.

JOHN MCCLAVE, respondent agt. E. T. MAYNARD, appellant.

Where the plaintiff, a *real estate broker*, had been employed by the defendant to sell or exchange for him certain real estate, a farm and four lots; the farm he would sell for \$5,000, or would exchange the whole for \$13,000; and agreed to pay plaintiff's commissions at the rate of two and a half per cent: After a purchaser had been introduced to defendant by the plaintiff, and some considerable delay at negotiations, at which the defendant became dissatisfied, and requested the plaintiff to find him another purchaser, but upon plaintiff's request negotiations were renewed, and an exchange finally made, but the defendant insisted that the purchaser should pay the plaintiff's commissions, which was agreed to by the plaintiff in a note to defendant, by the purchaser, as follows:

"Mr. B. (the purchaser), has agreed to assume the payment of your commissions on the exchange of property between you. Therefore, whatever you do will be in consideration of that fact." "Mr. B.'s promise is satisfactory to me."

Held, that evidence offered by the defendant at the time of the delivery of this note, under the question: "At the time you (the purchaser) received the letter from McClave (plaintiff), what was said between you?" should have been received, and it was error to exclude it, as the plaintiff claimed that the amount of commissions fixed with B., the purchaser, was \$100, provided the valuation was \$5,000, as he represented it to be; when in fact, the amount of the exchange was \$13,000.

Any thing said by the plaintiff relating to the subject in controversy, was admissible, when offered by the defendant.

New York General Term, January, 1867.

Before LEONARD, P. J.; INGRAHAM and CLERKE, Justices.

ACTION to recover three hundred and seventy-five dollars, amount of commissions for negotiating the sale or exchange of real estate. The plaintiff is a real estate broker in this city. The defendant, in or about the month of December, 1863, was a resident and the owner of certain real estate, at

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Caldwell in New Jersey, which estate consisted of a farm and four houses. In the month of December he called on the plaintiff, as a broker, and desired him to sell or exchange this real estate for him. The defendant instructed the plaintiff to sell the farm for \$5,000, or to exchange the whole property. Directed the plaintiff to find a purchaser, and send him to defendant, and he would pay the plaintiff commissions upon what was sold.

The plaintiff found a purchaser for defendant's real estate, and introduced such purchaser to the defendant. The defendant and the purchaser, whose name was Beach, entered into a contract by which the defendant was to give Beach his real estate in New Jersey for New York and Brooklyn property, at a valuation of \$13,000.

The defendant passed his property, under this contract, on the 9th of April, 1864, with the understanding that he was to pay commissions to the plaintiff. By the terms of the contract entered into by defendant and Beach it appeared on the trial, that the commissions due from the defendant to the plaintiff were to be paid by Beach. This contract between Beach and the defendant was concealed by them from the plaintiff, and he had no knowledge of its existence, or of its terms and consideration, until just previous to commencing this suit, and long after the exchange had been concluded. On the 8th of April, 1864, when the defendant and Beach were about passing the title, the defendant sent Beach to the plaintiff to arrange about his (defendant's) commissions, and to procure from the plaintiff some writing which defendant might hold as a bar to any claim which the plaintiff might make against him for commissions.

Mr. Beach, in obedience to the directions of defendant, went to the plaintiff and arranged for defendant's commissions, by agreeing to assume them, stating to the plaintiff that the property exchanged by the defendant was but \$5,000.

The plaintiff, relying upon the statements of Beach, fixed

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the amount of defendant's commissions at \$100, provided the valuation was \$5,000; and, thereupon, at the direction of, Beach, notified the defendant that Beach had agreed to assume the payment of his commissions, and that Beach's promise was satisfactory. The plaintiff, by reason of the representations of Beach, was induced to, and at the dictation of Beach, did write the following letter:

"Mr. B. (the purchaser), has agreed to assume the payment of your commissions on the exchange of property between you. Therefore, whatever you do will be in consideration of that fact." "Mr. B.'s promise is satisfactory to me."

The defendant's answer admits the employment of the plaintiff, and that he negotiated the exchange of defendant's property, *and it appears, by the defendant's own showing*, that the property exchanged by him was passed at \$13,000. The defendant, in his answer, as defense to this action, avers that the plaintiff agreed with the purchaser of the defendant's property, that the commissions chargeable to the defendant on said exchange should be borne and paid by the purchaser, as the payer of said commissions, in the place and stead of the defendant, and so notified the defendant; and, on the trial, in support of this agreement, he offered, as evidence, the paper writing marked "A."

It is admitted that the defendant exchanged property to the value of \$13,000, with Beach, and upon which commissions were chargeable.

The defendant insists that this agreement and paper writing marked "A," form a perfect discharge of defendant from all liability exceeding \$100; that a tender of of that sum has been made by Beach to plaintiff

The plaintiff admits that Beach promised and agreed to pay defendant's commissions, and that he wrote exhibit "A." and sent it to the defendant. He swears, however, that he was induced to accept that agreement, and write exhibit "A." by reason of the fraudulent statements made, by Beach to

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him, in reference to the amount of property exchanged by the defendant; that defendant had sent Beach to the plaintiff to arrange about defendant's commissions, and, in reply to the request of the defendant, made through Beach, the plaintiff accepted the agreement and promise of Beach to pay defendant's commissions, and wrote and sent to defendant exhibit "A." The plaintiff swears that Beach had been sent to him by defendant for the express purpose of arranging about defendant's commissions, and that Beach then stated to plaintiff that defendant had exchanged but \$5,000 worth of property.

The plaintiff swears that he did not know of the contract between defendant and Beach. The defendant admits that he did not tell the plaintiff of that contract. Beach swears that he did not show it him.

The defendant and Beach had each a copy of the contract, but admit that they did not allow the plaintiff to see it.

The plaintiff testified that Beach had been sent to him by defendant to arrange about (his) defendant's commissions. This evidence of the plaintiff, fixing Beach as the agent of the defendant, is not, in any form, denied by defendant or Beach. The plaintiff further testified that, in arranging about the defendant's commissions, Beach fraudulently and deceitfully represented to plaintiff that the only property that the defendant exchanged was that contained in exhibit 1, at \$5,000. The plaintiff testified that, under these fraudulent representations made by Beach and the deceit practiced by him in being silent as to the full amount of the exchange, he accepted the agreement and promise of Beach, and wrote exhibit "A." The plaintiff testified that "the amount fixed with Beach was \$100, provided the valuation was \$5,000. This evidence is not denied by Beach or defendant. As to the tender there is no evidence showing that Beach made a tender of \$100 for the commissions of the defendant exclusively, but that he coupled with it a discharge of himself from all liability.

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T. STUYVESANT and L. B. PERT, for defendant, appellant.

I. The original employment of plaintiff to sell or exchange the property cannot be held binding upon defendant.

Because,

1. Whatever may have been the terms and conditions of that employment, the whole matter was abandoned and rescinded.

Defendant notified plaintiff to procure another purchaser—that he would not deal with Beach.

And when plaintiff informed Beach of the fact, and offered to take \$100 for his commissions if negotiations were renewed; and again when he agreed in writing to look to Beach for his commissions, he consented to and acquiesced in the rescision of the original agreement.

That agreement, therefore, was wholly at an end.

One who employs another to do certain work for him may countermand the order, and the other has no right to proceed further. (*Clark agt. Marriglia*, 1 Den. 317.)

2. Because a new agreement was substituted in place of the original employment.

And this was done at plaintiff's request or on his consent. In either case, the rescision was complete and binding upon plaintiff, upon his own authority and acquiescence.

II. The law justly applied to the facts of this case should estop the plaintiff from maintaining any claim against defendant.

1. The original employment was verbal. The transaction was an exchange of property, in which, according to the circumstances, or agreement of parties, either might be liable for commissions. Both could not be. (*Watkins agt. Causall*, 1 M. D. Smith, 65; *Vanderpoel agt. Kearns*, 2 id. 170; *Dunlap agt. Richards*, 2 id. 181; *Pugsly agt. Murray*, 4 id. 245.)

And the parties were as competent to change the agreement as they were to make it originally.

2. A new arrangement was made, as we have seen under point I., and plaintiff clothed his acquiescence in writing, and became one of the contracting parties to that change.

3. But, more than this, he was a principal actor. He informed Beach of the abandonment, and with an eye to commissions, requested Beach to see defendant and renew negotiations.

And whether he offered to take \$100, or consented to it on Beach's offer, it was by his own procurement in whole or in part, and upon terms wholly or in part originating with himself that the thing was accomplished.

4. Besides this, defendant made it an express condition that Beach alone should settle with plaintiff for his commissions.

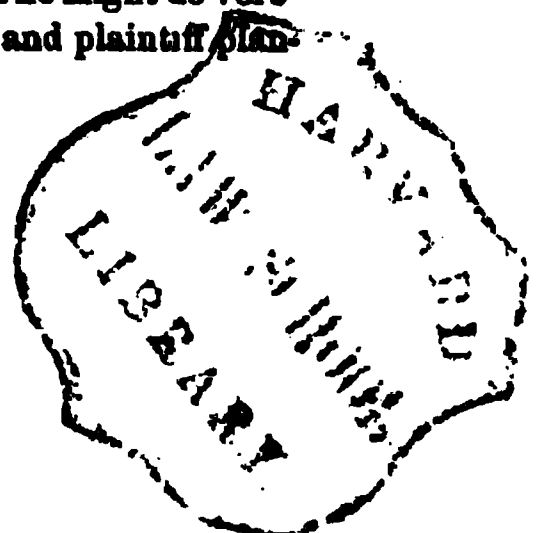
5. To such a case the law of estoppel eminently applies.

Plaintiff's acts having influenced the conduct of defendant must conclude the former. (1 *Greenleaf on Ev.*, §§ 27, 195, 196, 207.)

The present claim is inconsistent with plaintiff's consent and agreement, upon which alone defendant acted. (See *Plumb agt. Cattaraugus County Mutual Insurance Co.*, 18 N. Y. R., (4 Smith,) 392.)

III. It is no answer to say that the new arrangement was an agreement to answer for the debt of another.

1. Beach was as competent to bind himself as defendant—and this he might do verbally or otherwise, for the old agreement was abandoned when he and plaintiff planned the scheme of renewal.



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2. Beach was a party to the exchange, and since in such case the broker cannot recover commissions of both. (*Watkins agt. Causall*, 1 *E. D. Smith*, 65, and other cases cited above.) Plaintiff's election and his agreement to look to Beach must be conclusive to bind him and plaintiff.

3. In any event the agreement is binding upon plaintiff, being in writing, and upon sufficient consideration.

4. As where a broker is paid by the purchaser he cannot recover of the seller employer. (*Dunlop agt. Richards*, 2 *E. D. Smith*, 181.)

So where there is an agreement for such payment, the broker must rely upon that.

IV. It was said upon the trial—and may be urged here—that plaintiff is not concluded by the new arrangement, because he was misled into the belief that the property exchanged was only \$5,000.

There is no proof or pretence that defendant practiced any deception, and the only evidence that Beach did is that of plaintiff alone; and upon this, in some mysterious way, through the agency of Beach, defendant's liability is sought to be revived.

Plaintiff testifies that when he wrote exhibit "A." he did not know the exact amount—that he wrote it and made the promise on the supposition that only \$5,000 of property passed—that he wrote it before he ascertained that \$13,000 was the value; and that it was about the time that Beach told him it was \$5,000. And yet in the same breath he says that Beach stated to him that the property described in exhibit 1, was all that passed.

Now it was this very property that he was employed about; he knew it was exchanged, while exhibit 1, shows upon its face that the farm alone was valued at \$5,000, and there were four houses in addition.

Moreover, defendant says he offered the farm at \$5,000, or to exchange the whole at \$13,000; and he left also a description of the four houses, and Beach testifies that he stated the value to plaintiff at \$13,000.

A plaintiff uncorroborated, who sometimes keeps books, and sometimes not—who never enters half his commissions, and made no entry in this case, who contradicts the very basis of his employment, and who is disputed by two witnesses, cannot be relied upon to show that he was deceived.

V. The referee erred in denying the motion to dismiss the complaint.

1. There was no evidence that the property was sold or exchanged for the defendant, but on the contrary, it was actually for Beach.

2. It was abundantly shown that whatever plaintiff's commissions were to be, plaintiff was to look to Beach for them, and not to defendant.

3. The plaintiff, if misled, should look to Beach for redress.

VI. The referee erred in excluding evidence when offered by defendant, of what was said between Beach and plaintiff, when exhibit "A." was written, and in admitting the same evidence when offered for plaintiff.

Which ever ruling was right, the other must be wrong.

VII. The findings of the referee are against law and evidence, and wholly erroneous, and for reasons stated in the exceptions to that report, the judgment should be reversed.

HENRY DAILY, Jr., for plaintiff, respondent.

First. The employment of the plaintiff by defendant to exchange his property, and that the property was exchanged at a valuation of \$13,000, is admitted. The only question left for decision is, can the verbal promise and agreement of Beach to

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the plaintiff to pay the defendant's debt for commissions, and the notification by plaintiff to the defendant that this promise and agreement of Beach was satisfactory, be set up as a valid bar to this action?

I. The agreement, as set up in the answer, or appears in the evidence, is not in writing, expresses no consideration, and is therefore void by the statute of frauds. It is an agreement to answer for the debt of another. (2 *E. S.* 221, § 2, *sub. 2*; *Sackett* agt. *Palmer*, 25 *Barb. R.* 179; *Brewster* agt. *Silence*, 4 *Seld. R.* 207; *Mal-lory* agt. *Gillett*, 23 *Barb. R.* 610.)

Second. The defendant sent Beach to the plaintiff to arrange about the commissions, and Beach, in obedience to such instructions, did arrange for the commissions, by agreeing to assume or pay them himself, stating to the plaintiff that the valuation of the property passed was only \$5,000, and the plaintiff, relying upon the representations of Beach, wrote and sent to the defendant the paper marked "A." The representations of Beach were false and deceitful and the plaintiff was misled.

II. The agreement set up in the answer, or as proven on the trial, and the notice of it by plaintiff to the defendant, even if the statute of frauds did not apply, are *inoperative* and void, and have no binding force upon the plaintiff, by reason of the fraud and deception practiced by Beach. The defendant, having sent Beach to the plaintiff to arrange for the commissions, *constituted Beach his agent* for that purpose, and the defendant is bound by the acts of Beach in making that arrangement. (*Story on Agency*, §§ 134, 135; *Jefferson* agt. *Bigelow*, 13 *Wend.* 518.)

III. The paper writing marked "A." and produced in evidence, on the trial, by the defendant, is simply written proof of the verbal agreement and promise of Beach to pay the debt of the defendant, and a notice to the defendant that Beach had made such agreement and promise to the plaintiff, *and in no manner contains words of release and discharge.*

IV. The referee's finding of fact will not be disturbed unless grossly against evidence, and is as conclusive as the verdict of a jury.

INGRAHAM, J. I think the referee erred in excluding the evidence offered at folio 51. The question was, what was said between them when the defendant received the letter from McClave. This was excluded.

Previous to that, McClave had on proof of his letter to defendant saying that he would accept Mr. Beach's promise to pay the commissions, stated that at that time he was not informed as to the exact amount that had passed between them, and he was also permitted to state what his suppositions were when he wrote that letter. It was clearly the right of the defendant to show what conversation passed between them when the letter was delivered. It was not negotiation previous to writing the letter, but what took place when defendant received it.

In addition to this, if the defendant acted on the plaintiff's letter, and was guilty of no fraud, it would be immater-

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ial what the plaintiff supposed was the amount. He chose to take Beach for his pay-master rather than have the contract fail, and on his promise to do so the defendant acted.

If Beach deceived him, the plaintiff is not responsible.

The judgment should be reversed, and case referred back to referee.

LEONARD, J. The evidence excluded at fol. 51 was admissible. It related to an admission by plaintiff, and was offered by defendant. Anything said by the plaintiff relating to the subject in the controversy was admissible, when offered by defendant.

The judgment should be reversed, costs to abide the event.

CLERKE, J., *dissenting*. When the defendant first called upon the plaintiff, he employed the latter to sell for him a farm in New Jersey, consisting of sixty-five acres, which he valued at five thousand dollars; he also said he had other property, which he wanted to sell; he promised to pay the plaintiff a commission at the rate of two and a half per cent. The property other than the farm, which he wanted to sell, consisted of four houses, also in New Jersey. The defendant testifies that he called upon the plaintiff in December, 1863, or January, 1864, and offered to sell the farm for five thousand dollars, or to exchange the whole for thirteen thousand dollars. Both parties testify that the plaintiff introduced a Mr. Beach to the defendant for the purpose of negotiating an exchange of this property in New Jersey for property which Mr. Beach owned in New York and Brooklyn. They agreed on the exchange; but the defendant says he became dissatisfied in consequence of Beach's dilatoriness in consummating the bargain, and he says he told the plaintiff to procure him another purchaser; but, within a few days after, Beach called and satisfactorily explained the cause of the delay, and the bargain was consummated, the defendant's

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property being estimated in the exchange at thirteen thousand dollars. Afterwards, the plaintiff agreed to receive one hundred dollars for his commissions, and to look to Beach for the payment of this sum. But the plaintiff testifies that he promised to do this because, from defendant's silence and from what Beach had expressly told him, he believed that the property of the defendant, which was disposed of, was only of the value of five thousand dollars. If this is true, he was certainly not bound by this promise, even if it amounted in all other respects to a valid agreement. The referee gave credence to the plaintiff's testimony on this point, in preference to that of the defendant, and I see no reason why his conclusion should be disturbed.

With regard to the exclusion of evidence at fol. 51, this evidence was actually admitted at another stage of the trial, and was fully submitted to the referee.

The judgment should be affirmed, with costs.

SUPREME COURT.

HALSTEAD FORD and others agt. CHILLION FORD and others.

On the *trial* of a cause, the *court* has no power, and consequently a referee has none, to allow the *amendment* of a pleading by inserting a *new cause of action* or a *new defense*.

If on the trial such an amendment is desired, it can only be obtained by suspending the trial or hearing, and applying *on motion to the special term*.

The opinions advanced in *Woodruff agt. Dickie* (31 *How. Pr. R.* 164): "that a referee is no longer an officer of the court," or that "the court at special term has no more power to grant amendments than the court has on the trial," or "that a referee has all the powers of a court at special term to allow amendments," not concurred in.

A referee appointed to hear and determine a cause is always under the control and direction of the court, and may be removed at its pleasure.

Where the referee on the hearing, makes an order allowing the amendment of an answer by inserting therein the defense of the *statute of limitations*, it is an order made without authority; and although it is the subject of exception and may be reviewed on appeal from any judgment which might be entered on the referee's

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report; the plaintiff is not restricted to that mode of redress; he may take the more expeditious and less expensive mode, by moving at special term to set aside the order.

The special term possesses the power to set aside any order made by a referee in the progress of a cause, which he had not authority to make; and also the power to compel him to proceed to the trial of the issues referred to him for determination. (*The case of Union Bank agt. Mott*, 18 How. Pr. R. 516, approved and followed.)

St. Lawrence County Special Term, June 2d, 1868.

THIS was an action by *cestui que trusts* against their trustee and others.

The complaint was personally served, and after a long delay an answer was served; to such answer a demurrer was interposed; thereupon the defendants served an amended answer. Upon the issue thus joined the cause was, by stipulation, referred for trial.

On the trial of the cause the defendants moved the referee for leave to amend their answer by adding a count setting up the statute of limitations. The referee, under plaintiffs' objections, granted the motion and made an order allowing the amendment, which was made.

The final hearing of the cause being adjourned, pending such postponement, the plaintiffs on notice, apply to this court by motion, to set aside the order of the referee, and for a direction that he proceed to hear and determine the cause upon the issues referred to him for trial.

E. C. JAMES, *for plaintiffs.*

GEO. MORRIS, *for defendants.*

JAMES, J. There seems to be some conflict in the decisions as to the power of the court to allow amendments to pleadings after issue joined. Leave to amend is asked for at different stages of the action; sometimes before trial, sometimes on the trial, and sometimes after trial; and the difference in the powers of the court at these different stages, seems to have been lost sight of in some of the reported

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cases. So, also, of the powers of the court at circuit, on the trial, and the special term, on motion.

Before the Code, this court possessed and exercised the power of allowing amendments to pleadings upon the application of either party; a new cause of action, or a new defense, was often allowed by amendment. It was a power necessary to the administration of justice; and the permission for its exercise was obtained by application to the special term upon notice.

The power of the court to allow such amendments being conceded, its permission or refusal, or the terms and conditions, were always in the discretion of the court, each case depending upon its own peculiar features, facts and circumstances.

That portion of the opinion in *Woodruff* agt. *Dickie* (31 *How. Pr. Rep.* 164), which asserts, "that the courts never claimed the power, either at common law or under any previous statutes, to allow an amendment to an existing pleading by the insertion of a new and different cause of action or defense," is unsound. It is true courts never claimed the power of substituting one kind of action for another by amendment, as tort for assumpsit, or *vice versa*; but the power to add another cause of action of the same nature, or another defense that went to defeat the action, was always claimed, although, permission was not always granted. Even the authorities cited by the learned judge in *Woodruff* agt. *Dickie* (*supra*), do not deny the power above claimed, but negatively concede it. *Sackett* agt. *Thompson* (2 *J. R.* 206), was for leave to strike out a single count and add a new count, or for leave to add two new counts. It appeared, that a former action for the same cause had been once tried and plaintiff non-suited; that the present suit had been four several times noticed for trial by the plaintiff; and on these grounds the motion was denied; not because of the want of power; and not one of the authorities there cited put the denial on the want of power; while in two cases, *Bearcroft*

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agt. *Hundreds of Burnham and Stone* (Levins, 347), and *Dutchess of Marlborough* agt. *Wigman* (Fitz. 193), the amendments *were allowed* under the peculiar circumstances of each case; thus asserting the power. *Trinder* agt. *Durant* (5 *Wend.* 72), related to a plea in abatement and hence had no application. *Williams* agt. *Cooper* (1 *Hill*, 637), was an action of slander and the declaration counted upon words charging the stealing of apples, and the plaintiff asked leave to amend by adding a count for stealing boards; the motion was not denied for the want of power in the court to allow it, but because the statute of limitations had run against the cause of action sought to be inserted, and the court said, "a new cause of action would be allowed by way of amendment, provided the suit intended to embrace it and it was omitted through mistake;" here again asserting the power of the court to grant amendments by inserting new causes of action.

Numerous cases might be cited showing the exercise of such power by the courts; but it is unnecessary. Experience has taught the necessity of such a power. As was said by Justice SMITH in *Union Bank* agt. *Mott* (19 *How. Pr. R.* 267), "the exercise of the discretion (which such power confers), is among the most embarrassing duties cast upon the courts, and yet its existence and exercise is indispensable to the proper administration of public justice." I, therefore, repeat, that independent of the Code, this court at special term on motion, at any time before verdict, has the power to allow amendments to pleadings, by permitting the insertion of a new cause of action or new defense. (*Beardsley* agt. *Stover*, 7 *How.* 294; *Harrington* agt. *Slade*, 22 *Barb.* 161.)

But the power of the court to allow such an amendment *during the trial of a cause*, is another and quite a different thing. Such a power did not exist before the Code, and I cannot discover that it has been conferred by that statute.

In this case, the application for leave to amend was during

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the trial, and was made to the referee. Before the Code, a referee had no power to grant any amendments to the pleadings, in an action pending before him; by section 272 of that statute, referees are given the same power of amendment as the court, *on the trial* of a cause, so that now each tribunal has equal powers of amendment *on the trial*. To determine this motion, it is only necessary to ascertain the powers of the court to allow amendments of pleadings on the trial. Whatever that power is must be deduced from chapter 6, title 2, part 2 of the Code. Sections 169 and 170 treat of material and immaterial variances; section 171, of a failure of proof; section 174, of mistakes, and how they may be relieved against; section 175, of fictitious names; section 176, of the errors and defects that may be disregarded; section 177, of supplemental pleading; section 172, of amendments, as of course; and section 173, of amendments *by order of the court*. The power to allow the amendments asked for in this case is claimed in virtue of section 173; and it is therefore important that it have a careful analysis, to determine if any such power is given.

It is by said section enacted, that "the court may, before or after judgment, and on such terms as may be proper, amend any pleading, process or proceeding: 1st. By adding or striking out the name of any party; 2d. By correcting a mistake in the name of any party; 3d. Or a mistake in any other respect; 4th. Or by inserting other allegations material to the case; 5th. Or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved."

The amendment allowed by the referee did not come within the first, second, third or fifth subdivisions. It was only claimed as authorized by the fourth subdivision, and that it came within the letter and spirit of the clause which authorized the court at any time to amend a pleading "by inserting other allegations material to the case." But an amendment setting up a new cause of action or defense is not within the phrase,

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“other allegations material to the case.” The fair construction and meaning of that phrase is, that where a cause of action is improperly set forth in the complaint, or defense in the answer, or a pleading is defective for any reason, the court may, in its discretion, at any stage of the case, authorize such imperfection or defect to be remedied by amendment, by inserting allegations necessary to make the case as intended by the original pleadings; but not to insert a new and distinct cause of action or defense. In fact, the fifth subdivision of section 173 negatives the idea that the law makers by said section intended to vest in the court the power to change, upon the trial, the substance and nature of the issues presented by the original pleadings. Why would the legislature restrict the power of conforming the pleadings to the facts proved to cases where it did not change substantially the claim or defense, if by the preceding subdivision it had empowered the court to allow by amendment the insertion of a new cause of action, or new defense? Besides, the power given by the fourth subdivision may be exercised at any time before or after judgment; and if it empowered the court to allow by amendment the insertion of a new cause of action or defense, its exercise after judgment would be disastrous to the party against whom the amendment was allowed. The bare fact that the power given by the whole 173d section may be exercised after judgment, is conclusive that it did not contemplate the power of setting up a new cause of action or new defense.

I am aware that the general term in this district, in *Van Ness* agt. *Bush* (22 *How.* 481), held that a referee on trial has the power to allow an amendment setting up a new defense. The members of the court were not united in that decision, and the case was published without assent. The cases cited in the opinion published do not sustain the decision. *Beardsley* agt. *Stover* (7 *How. Pr. R.* 294) was not an amendment allowed on the trial, but was an application at special term, on notice, heard before trial; and the power

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of the court at such time, and on such motion, to allow an amendment of the pleadings, by inserting a new cause of action or setting up a new defense, is precisely what I assert; but the right to allow such an amendment *on the trial* does not follow. So, in *Harrington* agt. *Slade* (22 Barb. 164), the motion was at special term, before trial, for leave to file a supplemental answer, and had no bearing upon the question of power in the court to allow a new cause of action or defense to be inserted in a pleading by amendment. In view of the cases of *Catlin* agt. *Hansen* (1 Duer, 309) and *Fagan* agt. *Davison* (2 Duer, 153), in the former of which it was held "that evidence could not be given to support a defense different in its entire scope and meaning from that set up in the answer, and that the answer could not be amended so as to let it in;" and in the latter, "that a judge, on the trial of a cause, has no power to strike out the only defense made by the answer, and substitute another, different and inconsistent;" of the more recent decisions of this court in *Union Bank* agt. *Mott* (18 How. 506; 19 How. 114 and 267), *Woodruff* agt. *Hurson* (32 Barb. 557), *Dunnigan* agt. *Crummey* (44 Barb. 528), and the higher authority of *Everett* agt. *Vendryes* (19 N. Y. 436), I think I may disregard the case of *Van Ness* agt. *Bush* (*supra*), and follow these other decisions.

It is quite certain that, on the trial of a cause, the court has no power to allow the amendment of a pleading by inserting a new cause of action or a new defense. It is also clear that, if such a power is not possessed by the court on trial, it is not possessed by the referee. If, on the trial, such an amendment is desired, it can only be obtained by suspending the trial, or hearing, and applying on notice to the special term.

I cannot subscribe to the opinions advanced in *Woodruff* agt. *Dickie* (*supra*), "that a referee is no longer an officer of the court," or "that the court at special term has no more power to grant amendments than the court has on the trial,"

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or "that a referee has all the powers of a court at special term to allow amendments." A referee appointed to hear and determine a cause is always under the control and direction of the court, and may be removed at its pleasure; and the difference between the powers of the special term, and the court at circuit, on the trial, or the reference, I have endeavored to demonstrate.

It is perfectly clear that the referee had not authority to make the order sought to be set aside. But it is insisted that the plaintiffs have mistaken their remedy; that they cannot have relief by motion before verdict, but must except to the referee's ruling and appeal to the general term, after judgment. It is no doubt true that the order of the referee was the subject of exception, and might doubtless be reviewed on appeal from any judgment that might be entered on his report. But the plaintiffs were not restricted to that course for redress; they had the right to seek a more expeditious and less expensive mode. The special term, in my judgment, possesses the power to set aside any order made by a referee, in the progress of a cause, which he had *not authority to make*, and also the power to compel him to proceed to the trial of the issues referred to him for determination. Such was in substance the decision of the court in *Union Bank agt. Mott* (18 How. Pr. R. 506), and in my judgment that ruling should be followed.

In that view the plaintiffs were right in their course of proceeding; and the order of the referee, being beyond his power to grant, it must be set aside, with \$10 costs.

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N. Y. SUPERIOR COURT.

HARRIET BUTLER, administratrix, &c. agt. GEORGE W. NILES
and another.

Where the court, in an action to set off judgments, directs such set off upon condition that the plaintiff pay the costs of the supplementary proceedings instituted by the defendant on the judgment against the plaintiff, and deliver to the defendant a receipt, by the plaintiff applying the amount of the defendant's judgment on the judgments held against the defendant by the plaintiff, the defendant cannot refuse to accept such costs and receipt, on the ground that the plaintiff could not properly execute such condition, as he would be violating the injunction in the supplementary proceedings.

The acts required of the plaintiff are authorized by the judgment of the court, which is necessarily a complete justification and protection to him for all acts done under it.

Besides, if the performance of such condition could be regarded as a violation of the injunction, it would merely subject the plaintiff to punishment as for a contempt, and would not render the receipt or the payment of costs ineffectual or invalid. Therefore the defendant would have no concern in the matter.

Special Term, March, 1868.

THIS is a motion for final judgment. The action was commenced in February, 1863, by Thomas Butler, to set off two judgments in favor of one Francis Morris against the defendant George W. Niles, and assigned to Butler, against a judgment in favor of Niles against Butler. Judgment in the action was entered directing such set-off to be made, and that "upon a tender, in five days after notice of judgment, by or on behalf of said Thomas Butler, to the defendants, of a receipt for so much of the amount due to said Butler upon said two judgments assigned to him, as should be equal to the amount due on said judgment against him, together with said costs and expenses, and also a satisfaction-piece of said judgment, and a consent to be signed by the said defendants to discontinue said supplementary proceedings and action on said judgments, and a receipt for the amount of said costs, the defendants therein should execute such satisfaction piece and receipt. And further, should the said Thomas Butler refuse or decline to sign and file such satisfaction piece, the

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the said complaint of the said Thomas Butler should be dismissed with costs."

It was shown by the moving papers, on the part of the plaintiff, that the several receipts, costs, satisfaction piece, and consent to discontinue the supplementary proceedings, had been tendered by the plaintiff to the defendant Niles.

That Niles refused to receive the costs or to sign the satisfaction piece, the receipt, or the consent. It was further shown, that the consent and receipt on the part of the plaintiff, required to be given to the defendants, was signed by the plaintiff, filed with the clerk of this court, and copies served on the defendants.

It was conceded that the plaintiff had fully complied with the requirements of the judgment, and she now moves for final judgment.

On the part of the defendant it was shown, that at the time Butler signed the consent and receipt, he was restrained by an injunction in proceedings supplemental to an execution issued at the instance of the defendant Lee, upon a judgment against Butler in favor of one Peter Morris, which had been assigned to the defendant William Lee, from transferring, disposing of, or making any other disposition of any property belonging to him; and it was claimed that, while under such restraint, Butler could not comply with the judgment in this case and give the receipt and pay the costs, as required, and, therefore, the defendants' refusal to accept such receipt and costs, or to execute the several papers on his part, was proper.

J. E. BURRILL, *for plaintiff.*

I. T. WILLIAMS, *for defendants.*

MONELL, J. The judgment in this case directed that the judgment in favor of Niles against Butler should be set off against the judgments against Niles held by the plaintiff, thus absorbing the whole amount due on the former judg-

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ment, but leaving a balance due on the latter judgments. The judgment also directed the payment by Butler of the costs of supplementary proceedings instituted upon the Niles judgment against Butler, and the delivery of a receipt by Butler applying the amount of the Niles judgment upon the two judgments held by him, and the payment of said costs, are made conditions precedent to Niles being required to satisfy his judgment against Butler and to discontinue the supplementary proceedings.

It is claimed that Butler's giving the receipt or paying the costs would be a violation of the injunction in the supplementary proceedings, and therefore cannot be done.

The first answer to the objection is, that the acts are authorized by the judgment of this court, in a case within its jurisdiction and powers, both as to the subject matter and the parties; which judgment is, necessarily, a complete justification for all acts done under it. It cannot be that an act done by the direction or under the authority of a court of competent jurisdiction and powers, having before it all the parties to be affected, can be questioned elsewhere. Lee, the prosecutor of the supplementary proceedings, and who alone can be pecuniarily affected, is a party to this suit and bound by the judgment; and is, therefore, in no condition to complain if a party to the suit executes the judgment. It is clear, I think, that the judgment is a complete protection to Butler, and he cannot be made responsible for any act or thing done by him under it.

Second. At most, the giving the receipt and paying the costs, if it could be regarded as a violation of the injunction, would merely subject Butler to punishment as for a contempt, and would not render the receipt or payment ineffectual or invalid. So that, even if Butler should subject himself to punishment, Niles could nevertheless hold his costs and retain his receipt. To do a wholly ineffectual act, although forbidden by an injunction, would hardly be deemed a violation of it; and, therefore, the act must be not only in

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defiance of the restraint, but must deprive the other party of some substantial right or affect some substantial interest. In the leading case of *The People* agt. *Sturtevant* (9 N. Y. R. 263), the act which violated the injunction, namely, the adoption of a resolution giving permission to construct a railroad, was assumed to be valid, as respected the grantees of the act; and Judge JOHNSON says (p. 271) it was contended that the resolution did not become an effectual grant, and therefore no violation of the command of the injunction; but to that he could not agree, and he held the resolution was effectual, although passed in violation of the injunction.

If, therefore, the giving the receipt and paying the costs are valid acts, as respects Niles, then the supposed violation of the injunction which might subject Butler to punishment for a contempt is a matter in which Niles has no concern.

In disposing of this question, I have treated it as if Butler was alive and amenable for his acts. Of course the tender of performance, long since made, and the subsequent death of Butler, relieves the question of all difficulty; as I am satisfied, for the reasons already stated, that the tender was not only proper, but sufficient.

The motion must be granted.



COURT OF APPEALS.

GARRIT S. MOTT, appellant agt. THE UNION BANK of the city of New York, respondent.

An order of arrest, may be made to accompany the summons, or at any time afterwards, before judgment. (Code, § 183.) The word "judgment" here mentioned, is defined to mean "the final determination of the rights of the parties in the action."

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A judgment obtained *by default*, founded on allegations of fraud, is such a judgment. But if the defendant moves and obtains an order opening the judgment with liberty to answer on terms, an order of arrest may be issued against him, notwithstanding the judgment is directed to stand as security.*

September Term, 1867.

THIS action was brought in the superior court of the city of New York, for an alleged false imprisonment of the plaintiff. The defendant justified under an order of arrest made on the 8th day of December, 1858, by a justice of the supreme court, in an action commenced in that court by this defendant against this plaintiff and Jacob H. Mott, for fraud.

PARKER, J. An order of arrest was obtained at the commencement of that action, under which Jacob H. Mott was arrested and held to bail, but this plaintiff was not found. He subsequently appeared in the action by attorney, but put in no answer to the complaint; and on the 5th day of November, 1858, judgment was taken against him by default. After this, and on the 11th day of November, 1858, he moved the court to set aside the default and judgment, whereupon the following order was made: "It is ordered, that the said defendant have leave to serve his answer to the complaint herein within ten days from the date of the entry of this order, and to proceed with his defense in this action, upon payment to the plaintiff's attorney of \$22.50, being costs of default and of this motion, and also the fees and charges of the sheriff upon the execution issued in this action. And it is further ordered, that such judgment stand as security for the alleged indebtedness of the said defendant to the plain-

* NOTE.—Thus it would seem the defendant is compelled to give *double security* for the payment of the plaintiff's claim—a judgment, which preserves all its force and vitality as a lien and security; and upon which execution against the body can be immediately issued, if the defendant does not succeed in his defense; and an undertaking as security upon issuing and service of the order of arrest. It would hardly seem to be the policy of the law to favor arrest and bail or imprisonment under such circumstances, although the decision that the judgment thus opened and modified is not a final determination of the rights of the parties, as defined by the Code, be strictly and technically correct.—REP.

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tiff." He accordingly paid the costs, fees and charges mentioned in the order, and served his answer to the complaint. On the 8th of December following, the order of arrest upon which he was arrested and held to bail, and under which the defendant justifies, was obtained, and the plaintiff was arrested, and in default of bail, committed to jail. For that arrest and imprisonment this action is brought.

Upon the trial the court held that the defendant was justified by the order, and dismissed the complaint, to which the plaintiff excepted. The court ordered the exceptions to be heard in the first instance at the general term, and that in the meantime, judgment be suspended. On hearing the exceptions the general term denied a new trial, and gave judgment for the defendant, from which judgment this appeal is brought.

Unless the order of arrest upon which the plaintiff was arrested and imprisoned was void, the judgment is manifestly right. The only question, then is, was the order of arrest unauthorized and void?

The only ground upon which it is claimed by the plaintiff to be void, is, that it was made after judgment.

Section 183 of the Code provides, in reference to the making of the order by the judge by whom it was granted, that "the order may be made to accompany the summons, or at any time afterwards, *before judgment.*"

It is clear that this language is a clear prohibition of the making of the order after judgment, and the reason obviously is, that after judgment the need and office of the *provisional* remedy ceases. If the action is one in which an order of arrest may be granted, upon the perfecting of judgment therein, an execution may issue against the person of the defendant. There can be, therefore, no further need of the order of arrest. This reason helps to construe the provision and show what is intended by the word "judgment," as it occurs in the section. The court below, I think, gave it the correct meaning, when it held that it meant in section 183,

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what it is defined to mean in section 245, to wit: "the final determination of the rights of the parties in the action." Until such a judgment is obtained—one which may be carried into effect by execution—the point has not been reached where the provisional remedy is no longer necessary; and for this reason, as well as for those assigned by the court below (8 *Bqsw.* 591), the granting of the order should be held to be limited only by such a judgment.

The judgment which was obtained by default, was undoubtedly such a judgment, until it was modified by the order letting the present plaintiff in to answer and litigate the claim set up in the complaint, and at the same time directing that the judgment "stand as security for the alleged indebtedness of the defendant to the plaintiff." The court has authority, under its general powers, as well as under section 174 of the Code, in its discretion, and upon such terms as it conceives to be just, to "relieve a party from a judgment," and "allow an answer to be made." In pursuance of this authority it may modify the judgment by depriving it of its ordinary character, as a *res judicata*, and leaving it in full force as a lien or collateral security (6 *Cow.* 390; 7 *Cow.* 477; 2 *J. Cas.* 286; 9 *How.* 442). That it clearly did in this case. I agree entirely with the court below that, "in substance and in form (the judgment and order of the 11th of November being read together), the judgment is one which neither acknowledges nor establishes any indebtedness of G. S. Mott to the bank, but is a judgment given as security for the payment of any sum that the bank should establish that Mott was liable to pay, and given in order to vacate the judgment in all respects, except to exist merely as such security. It was to perform the same precise office as a judgment confessed without action, for the same purpose, and no other."

The order places the parties back where they were before the judgment was entered, sets aside the default, and provides for the litigation of their rights in the action. The

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execution of the judgment would be plainly inconsistent with the right to litigate thus conferred. The judgment then, thus modified, and standing only as a lien or security, and not as the final determination of the rights of the parties, was no legal obstacle in the way of a valid order of arrest.

It follows, if this view is correct, that the judgment appealed from is right, and should be affirmed.

Concurring, WRIGHT, GROVER, HUNT and DAVIES, Judges. Affirmed.

COURT OF APPEALS.

JAMES H. SEGUINE, appellant agt. HENRY S. SEGUINE and others, respondents.

A man has a right to make whatever disposition of his property he chooses, however absurd or unjust. If capacity, formal execution and volition appear, his will must stand.

The doctrine of inofficious testaments, invoked from the Civilians, has no place in our law.

Where the evidence established most clearly and satisfactorily that the decedent, at the time of making his will, had *full testamentary capacity* to make his will, and acted of his own *free, uninfluenced will and wishes* in making, executing and declaring it, the fact that he gave only a small portion of his large estate to his only son and only child, and a small legacy to a sister, and the remainder and large bulk of his estate absolutely to his brother—these three persons constituting his only near relatives—could have no effect upon the validity of the will.

December Term, 1867.

APPEAL from a judgment of the supreme court, affirming a decree of the surrogate of the county of Richmond, admitting to probate the will of James S. Seguine, deceased.

The will in question was executed on the 22d May, 1859, at Rossville, in the county of Richmond, at the house of the testator's brother, Henry S. Seguine. The testator died at his residence, at Deep Creek, in the state of Virginia, on the 11th January, 1860, leaving an only son, James Henry Seguine. The executors named in the will, on the 20th January, 1860,

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propounded the same for probate before the surrogate of Richmond county, and it was opposed by the testator's son, on the ground of a want of testamentary capacity in the deceased, and further, that it was procured by undue influence. The question of capacity was principally litigated, the contestant claiming that, through intemperance and disease, the decedent was incompetent to make a will, or if not legally incompetent, was *imbecile*, and in that condition was unduly influenced. The testimony taken before the surrogate fills a volume of 600 pages, most of it on the part of the contestant, relating to the condition and habits of the testator, and of matters transpiring in the summer and fall of 1859, at Rossville, after the making of the will.

It is impracticable to give anything like a precise analysis of the voluminous testimony, nor is it important. The prominent and material facts are referred to in the opinion.

On the 15th October, 1864, the surrogate made a decree admitting the will to probate.

The contestant appealed to the supreme court in the second district, where the decree was affirmed, and he now brings an appeal to this court.

A. W. BRADFORD, *for appellant.*

A. C. BRADLEY and S. HAND, *for respondents.*

WRIGHT, J. James S. Seguine, the validity of whose will is the subject of this appeal, died at his residence at Deep Creek, in the state of Virginia, on the 11th of January, 1860, at the age of about fifty-five years. He was born in the county of Richmond (Staten Island), his family being an ancient one in the county; but from early life he had resided and was engaged in business in Virginia. His business was mainly lumbering in the Dismal and other southern swamps, but, in connection therewith, he built and owned shares in several vessels employed in the transportation of his lumber and other freight. This business he continued until his

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death. He left an only son, the appellant, who was a few months old at the death of his mother, in 1838. His other near relatives were a sister, the widow of a Mr. Guyon, and a brother, Henry S. Seguine. The brother and sister always resided on Staten Island, as did the son, who was reared in the family of the sister; the decedent, after the death of his wife, never marrying again or keeping a domestic establishment. He had lodgings in Virginia, where he spent most of his time, visiting the north in the summer season; and on such occasions, and when north on business, made his brother's house on the island his home.

The decedent had accumulated an estate, at his decease, of probably something over \$100,000. With the exception of a farm on the island, formerly belonging to his father, purchased by him in 1858, and fitted up and improved at a cost of some \$15,000, as a home for his son, his property was principally personal, consisting of money invested in Virginia and at the north. By his will, executed in May, 1859, some seven months prior to his death, and on his last visit to the north, after giving specific legacies to the amount of \$2,000, he gave to his sister, Mrs. Guyon, an annuity of \$500; to his son, James Henry Seguine, an annuity of \$700, and also an estate for life in the homestead farm, purchased for him in 1858, remainder to the son's children, if no children, to his grand-children him surviving, with a direction to the executors to spend the further sum of \$4,000 in improving the farm for the son's use; and to the brother, Henry S. Seguine, the residue of the estate.

No point is made that the requisite statute formalities to sustain the execution of the paper as the will of the deceased were not duly observed; the only question before the surrogate and here being as to the testamentary capacity of the deceased, and whether the will was or was not procured by undue influence of the chief beneficiary. The bulk of the property, it is true, is given to the testator's brother, and it may be conceded that the will is a will inofficious, so far as

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regards his son. But if the son had been wholly disinherited (which he is not, but a moderate competency given to him); not in favor of the brother, but of parties strangers in blood to the deceased, it would be no ground of itself for avoiding the instrument. The doctrine of inofficious testaments, invoked from the civilians, has no place in our law. A man has a right to make whatever disposition of his property he chooses, however absurd or unjust. If capacity, formal execution and volition appear, his will must stand.

A "disposing mind (said CRESWELL, J., in *Earl of Seftus* agt. *Haperral*, 1 *Fost. & Finl.* 598) does not mean that he should make what other people think a reasonable will, or a kind will, because, by the law of this country, he has absolute dominion over his own property, and if he, being in possession of his faculties, thinks fit to make a capricious, harsh or cruel will, you have no right to interfere; that would be to make his will for him, and not to allow him to make it."

"The right of a testator to dispose of his estate," said PORTER, J., in delivering the opinion of the court in *Clapp* agt. *Fullerton* (34 *N. Y.* 196), "depends neither on the justice of his prejudices nor the soundness of his reasoning. He may do what he will with his own; and if there be no defect of testamentary capacity, and no undue influence or fraud, the law gives effect to his will, though the provisions are unreasonable and unjust." (*Grindall* agt. *Grindall*, 4 *Hay Ex. R.* 1; *Wends* agt. *Murray*, 3 *Curt.* 623; *Butlin* agt. *Bary*, 1 *Curt. Ex. C.* 14; *Peck* agt. *Cary*, 27 *N. Y.* 18.)

If the deceased, then, possessed the requisite testable capacity, and the instrument was the free emanation of his will, it is valid, and is entitled to probate; and it is incumbent upon us so to adjudge, much, as in another forum, we might be inclined to regard the narrow provision for the son, in view of the deceased's wealth, as unjust and undutiful. There are, therefore, but the two questions, was there capacity and freedom from restraint.

1st. As to capacity. The evidence as to the general capa-

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city of the deceased is but one way. The case is not a balanced one, or one where the evidence greatly preponderates on that subject. The decedent, as has been stated, had been actually engaged in lumbering in Virginia for over thirty years, and according to all the testimony, was an unusually shrewd and energetic business man. His mind was clear, vigorous and strong. He was also a firm man, decided, self-reliant. A witness characterizes him (and this was the tenor of all the proof) as a man of "great capacity for business, remarkable for his firmness, self-reliance and tenacity of purpose." That clearness, solidity and strength were the general mental characteristics evinced by him throughout most of his life is not questioned by the appellant. But it is insisted that disease and intemperance, within the two years prior to his death, effected a thorough change in his mental condition, and that when the will was made he was insane, or if not properly insane, was imbecile. The suggestion that insanity existed in any form, or that the testator's mental faculties were perceptibly impaired at the time of the *factum*, is wholly unsustained by the proof. On the contrary, the proofs establish the fact that at that time his mind was as vigorous and sound as it had ever been. The instrument was prepared by Lot C. Clark, Esq., for many years his legal adviser in relation to his affairs at the north. Mr. Clark was alone with him in his room, at his brother's house, some two or three hours, conversing in respect to his property; receiving his instructions; getting his exact views in regard to the provisions of the will, his slaves, and the laws of Virginia and North Carolina as to them; and in drawing the instrument, as it was finally executed. All the directions for drawing it were given by the decedent without a suggestion from any other person. He exhibited a will made by him the year before, and which had been drawn by Judge Metcalfe, the surrogate of the county, and suggested the alterations he desired to make, assigning his reasons therefor. He named as witnesses Dr. Edgar, for many years

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his attending physician when visiting at the north, and Judge Winant, a friend from boyhood, and requested Mr. Clark himself to sign as a witness. According to the testimony of Mr. Clark, he "was as clear in mind and faculties as he had ever known him," "his mind was perfectly sound and clear." Dr. Edgar, being familiarly acquainted with his physical constitution and habits, and mental characteristics, "considered him of sound mind;" and Judge Winant, the other subscribing witness, concurred with them in these opinions. Judge Winant, after the will was executed, conversed with him at large respecting his health, and in reference to internal improvements in which he was interested in Virginia; in which conversation he indicated no defect of mental capacity, but full intelligence. He subsequently dined with the family. In addition to this proof, eight witnesses, residents of Virginia, knowing him well for many years, testified that down to his leaving Deep Creek for the north, some ten days before the will, his mental condition remained as good as they had ever known it; and Dr. Anderson, called as a consulting physician three days after the will, represented his "intelligence to be perfect." This evidence, which was wholly uncontradicted, tends to but one conclusion, that instead of the decedent being a person of permanently disordered intellect, at the execution of the will, there was no sensible indication that his rather unusual power of mind had ever begun to decay. He was, it is true, broken in health, having from youth been a sufferer from gout, which was hereditary, and which at length caused an affection of the heart and dropsy, the latter diseases developing themselves in connection in the spring of 1859. Such constitution as he had was nearly broken down, and though death was not to be immediately apprehended, the issue, as the physicians who examined his case some three days after the will, expressed "to be merely a question of time." But no one intimates that his bodily infirmities had then, if ever, created any mental disturbance, or enfeebled his intellect in

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any appreciable degree. Neither has the suggestion any foundation that indulgence in intoxicating liquors had thus impaired his mind. It appears, that although not wholly abstaining, he had for most of his life been abstemious in the use of liquors. A year or two before his death he indulged in a more free use of it, but not apparently to excess, at least, before the summer and fall after the will. In 1858 he spent the months of May, August and September at Rossville, where he could not have drank to any marked extent, for no one suggests that he was ever under the influence of liquor in the slightest degree. Prior to his visit to the north in 1859, he was shown to have been partially affected by it in two or three instances in Virginia, but was never seen intoxicated. Nor was he under its influence to any extent when the will was made.

In view of these facts, there is no color for saying that his indulgence in intoxicating liquors previous to the *factum* had affected his mind or his capacity to make a will. Nor, if it were at all important, does the evidence warrant the conclusion that his use of stimulants, during his stay and last illness at Rossville, after the will, reduced his mind to a state of general incapacity for the performance of a testamentary act. Such a conclusion is at war with the general facts of the case. There is no pretence that his drinking incapacitated him for business, or prevented him from attending to and controlling his business affairs. It indisputably appears that his business operations went on as actively as ever under his direction; and no matter relating to his affairs or property, north or south, however slight, anybody ventured to touch, without his previous authority. Those who speak most unfavorably of his habits represent him as constantly exercising memory, will, discrimination, firmness, and all the attributes of perfect intelligence. The habit of drinking undoubtedly grew on him as he sunk under his complicated ailments, and it may have tended in some degree to weaken his mind, but down to his departure for Virginia,

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some two months before his death, nobody pretends that he was imbecile. Indeed, the evidence distinctly indicates that up to this time he retained nearly his full strength of intellect.

The will then, is not impeachable on the ground of testamentary incapacity. There is no room to doubt that when it was executed the testator was fully competent. Bodily disease may have abated some of the former elasticity of his mind, but it was in no way *diseased*, or even in an incipient state of decay.

2d. There being capacity, was the will the free act of the decedent, or was it the result of undue influence exercised by his brother, the principal beneficiary? This latter question was not argued with any apparent confidence by the appellant's counsel, and I cannot well see how it could have been. Undue influence must be an influence exercised by coercion, imposition or fraud. It must not be such as arises from the influence of gratitude, affection or esteem, but it must be the ascendancy of another will over that of the testator, whose faculties have been so impaired as to subject him to the controlling influence of force, imposition or fraud. (*Gardiner agt. Gardiner*, 34 N. Y. R. 162; *Dean agt. Negley*, 41 Penn. R. 312; *Small agt. Small*, 4 Greenl. 220; *Trumbull agt. Gibbons*, 2 Zabriskie, N. J. R. 117.) Moreover, the exertion of the influence upon the very act must be proved, and it will not be inferred from opportunity and interest. (*Carroll agt. Norton*, 3 Bradford, 320; *Clapp agt. Fullerton*, 34 N. Y. R. 190.) I can discover nothing in the record that brings the case within the rules. The circumstances anterior to and attending the execution of the instrument are inconsistent with any other hypothesis than that it was the product of the decedent's own will, and not of the force, fraud or undue influence of any other. The fact is unquestioned that he was a man of more than ordinary vigor of intellect, of great firmness, self reliance and tenacity of purpose, and it is clear from the evidence that he retained his unusual powers

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of mind down to the period of making the will. He was not, therefore, in a condition to be exposed to undue influences. But the case is barren of evidence of any direct influences—much less those improper influences which will vitiate a testamentary act—exercised by the brother to procure the will. It may be that the decedent was unjust to his son, the appellant, in the disposition of his property, and that the brother should not have been selected as the chief beneficiary, but there is nothing rising to the dignity of proof of any undue influence or contrivance on the part of the latter to affect the result.

In its dispositions, in parts affecting the son and the brother, the instrument was similar to one made by the testator the fall previously at Rossville, except that the annuity to the son was reduced from \$1,400 to \$700. It is possible that the brother knew what this will of 1858 contained, but there is nothing to base a conjecture upon that he interfered in any way to bring it about. As to the will in question, the proof is equally decisive as to non-interference on the part of the brother.

It appears conclusively that the alteration of the will of 1858, by halving the son's annuity, was in accordance with a design of the testator, conceived in Virginia the winter previously; a design and result over which the brother had no possible influence in the nature of the case. The instrument was drawn in the room of the decedent, he being alone with Mr. Clark, his counsel. The instructions proceeded solely from him. The brother was not present at any time during the two hours spent in the act. He knew that the testator was making his will, as did the testator's sister, Mrs. Guyon, who was in the house at the time, but that he was any more cognizant of the contents of the instrument being executed than the sister, there is not the slightest proof. True, the *factum* was at his house, but that was the decedent's only home and resort at the north.

There was some evidence, also, that he conveyed the mess-

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age to Mr. Clark to come and draw the will, but his agency in respect to that message was not only natural, but affirmatively shown to have been in obedience to the wish of the decedent, conceived in Virginia before starting for the north.

In view of this state of facts, there is no ground for alleging that the decedent in publishing the instrument and dictating its contents was not acting of his own free, uninfluenced will and wishes.

There is much evidence in the case of matter transpiring at Rossville subsequently to the will. An allusion to it is unimportant.

The point of inquiry as to the testamentary capacity and the exercise of undue influence or fraud is before or at the time of the *factum*. Subsequent occurrences cannot affect the legal aspects of the case.

I am of the opinion that the questions of fact involved were rightly decided by the surrogate, and that the judgment should be affirmed.

Judgment affirmed.

It is understood that this was the last opinion ever delivered by Judge WRIGHT.

SUPREME COURT.

JOHN GREGG and EDMUND SAGE, respondents, agt. NELSON
BIRDSALL, appellant.

Where a grantor in executing a deed of land, excepts and reserves "all the pine and hemlock timber suitable for sawing, and all necessary facilities for removing the same with the right of flowing the lands now covered by the mill pond, while necessary for manufacturing the timber on the adjacent lands," he cannot be deprived of his property or reserved rights by an allegation that a *reasonable time* for removal and manufacture *has already elapsed*, and therefore his rights are extinguished. If any *time* could be fixed by the act of the adverse party—the owner of the premises, or by a judicial tribunal within which the power of removal and manufacture

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was to be exercised (which is doubtful, as the exception is absolute and unlimited), it should be in the future, by a notice given to the grantor to exercise his power of removal within some time to be named, so as to enable him to obtain the benefit of his reservation.

Albany General Term, September, 1866.

MILLER, INGALLS and HOGBOOM, Justices.

THIS is an appeal by the defendant from a judgment in an equity action in favor of the plaintiffs, against the defendant, seeking to restrain the defendant from the further exercise of certain exceptions and reservations contained in a deed from the defendant to one Heminover, under whom the plaintiffs claim, for a construction of those exceptions and reservations, and for a decree declaring them cancelled and extinguished.

The complaint sets forth that the defendant in 1856 conveyed to one Heminover a tract of land excepting and reserving "*all the pine and hemlock suitable for sawing, and all necessary facilities for removing the same, with the right of flowing the lands now covered by the mill pond, while necessary for manufacturing the timber on the adjacent lands.*"

The plaintiffs (Gregg and Sage) are the grantees of Heminover, and they set forth, that prior to the commencement of this action, the defendant (Birdsall) has cut and removed from said premises, all the pine and hemlock timber thereon, reserved by him in his said deed, that was suitable for sawing at the time of making such reservation.

They further allege that he has cut timber not suitable for sawing, and claims the growth of the timber, and claims to overflow the premises covered by the mill pond, until the pine and hemlock are manufactured. Also, that the term "*adjacent lands*" means only those lands conveyed by Heminover; and that previous to the commencement of the suit, they forbid his cutting any more timber on the premises. They aver that he has no further rights there, to cut timber or to overflow, and ask for a judgment prohibiting him from cutting any more and from overflowing on the premises and

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to have the reservation cancelled. No damages are claimed and the action is, therefore, for the *specific relief* demanded.

The defendant denies all the equities of the complaint, also the plaintiffs' title and most of the other allegations, except the execution of a conveyance to Heminover, which is admitted; and claims specifically that there was at the commencement of the suit and is a large quantity of hemlock and pine timber on the premises, which was reserved in the deed. He also avers that the term "adjacent lands," used in the deed, was understood by the parties and meant those lands owned by him the grantor, and conveyed to Heminover, but alleges that the term "adjacent lands" was used in its ordinary sense.

The plaintiffs, therefore, claim the interposition of the equity powers of the court.

1. To have the alleged cloud upon the title removed.
2. To have defendant restrained from cutting and removing any further timber from the premises.
3. To have the defendant restrained from overflowing the lands in question, in the process of manufacturing the timber cut and removed from this and adjacent lands.
4. To have a construction of the words of reservation.

The referee to whom the case was referred for hearing and decision, among other things, decides that the exceptions and reservations in question, were made—that the defendant has been in the full employment of the premises and reservations, and might, with proper and reasonable effort and industry, have availed himself of all the benefits and advantages secured, or intended to be secured by the reservations. He further finds, that there is still a large number of pine and hemlock trees standing on the premises sufficient to make from 40,000 to 50,000 feet of lumber, which was suitable for sawing at the time of the conveyance from defendant to Heminover; and that he had also cut and removed a large quantity of pine and hemlock timber not suitable for sawing at the time of such conveyance; and he adjudged, among

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other things, that all the exceptions and reservations should be removed, cancelled and terminated, except the right to cut and remove such pine and hemlock timber still remaining on the premises, as was suitable for sawing at the time the deed was executed, and directs a perpetual injunction against overflowing any part of the premises by the waters of the mill pond, and the removal of the water from said lands; and that the plaintiffs recover of the defendant their costs.

The defendant duly excepted, and judgment having been perfected, appealed to this court

W. J. GROS, *for plaintiffs, respondents.*

A. J. PARKER, *for defendant, appellant.*

By the court, HOGEBOM, J. By the judgment pronounced in this case, taken in connection with the referee's report, it appears that at the commencement of the action there was still upon the premises in question, a large number of pine and hemlock trees suitable for sawing at the time of the conveyance to Heminover, and which, under the exception and reservation in the conveyance to him, belonged to the defendant. By the terms of this exception and reservation, "all the pine and hemlock timber suitable for sawing, and all necessary facilities for removing the same, with the right of flowing the lands now (then) covered by the mill pond, while necessary for manufacturing the timber on the adjacent lands," were excepted and reserved to the defendant. This exception and reservation was absolute in terms, and unlimited as to the period when the act of removal and manufacture should be exercised. I do not see why the property in the excepted timber would not forever remain in the defendant, and those who derived title through him, and if any *time* could be fixed by the act of the adverse party, or of a judicial tribunal, within which the power of removal and manufacture was to be exercised (which I think doubtful), it should be in the *future*. Notice should be given to the de-

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fendant to exercise his power of removal within some time to be named, so as to enable him to obtain the benefit of his reservation—and he should not be deprived of his property or reserved rights by an allegation that a reasonable time for removal and manufacture had already elapsed, and, therefore, his rights were extinguished—and this without notice, that the plaintiffs wished him to remove his property from their premises. The only notice they gave him was one in effect, that his rights were already terminated, and that he must remove no more timber. The referee has decided that while there is still timber on the land, which the defendant owns, and has a right to remove, he has no right to manufacture it by overflowing the lands covered by the adjacent mill pond forever so short a time after such removal. The right to manufacture (and overflow for such purpose) is co-extensive with the right to remove, and it seems to me clear that so long as the defendant has timber, which he may remove, he has also the right to overflow the lands in question, for such reasonable time as may be necessary for such manufacture, after such removal. This right the referee has cut off by declaring it cancelled and terminated, and forbidding its further exercise; and I think improperly. This right is not, in my opinion, extinguished by delay in its exercise. The parties have not seen fit to impose any limitation of time in the conveyance in regard to the exercise or enjoyment of these privileges; and if any limitation can now be interposed, I think it cannot in equity, be done without allowing a reasonable time in the future for their exercise.

As this is decisive of the case, and necessarily leads to a reversal of the judgment, it is superfluous to consider any of the other questions in the case.

The judgment must be reversed and a new trial granted, with costs to abide the event.

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N. Y. SUPERIOR COURT.

CLARK B. WHEELER, respondent agt. ELISHA RUCKMAN,
impleaded, &c., appellant.

Where a *complaint* in an action is *dismissed* before the issues have been tried or a verdict of the jury given, the judgment of dismissal is no bar to a subsequent action for the same cause.

And where a *complaint* is *dismissed* for want of proper parties, the judgment thereon not being on the merits, is no bar to a subsequent action for the same cause.

A copy of a *case* used on an appeal from a judgment upon a former trial in this action, alleged to be in plaintiff's handwriting, offered in evidence for the purpose of showing a different statement by the plaintiff from that made on the present trial, is not admissible.

The case itself is no evidence of what took place on the former trial; and that it was in the plaintiff's handwriting is of no consequence.

Where the jury pass upon the question of the proper transfer to the plaintiff, on a certain day, of a promissory note in suit, such finding fully defeats any claim in attachment proceedings had against the prior owner of such note, after the date of such transfer.

If a defendant intends to rely upon the defense that the plaintiff purchased the promissory note sued on for the purposes of prosecution, as a practicing attorney, he must set up such defense in his answer, in order to give evidence of such fact upon the trial.

General Term, 1868; heard June 1, 1868; decided July 3d, 1868.

Before ROBERTSON, Ch. J., McCUNN and JONES, Justices.

APPEAL by defendant from a judgment in favor of the plaintiff.

The facts will sufficiently appear in the opinion of the court.

J. C. DIMMICK, *for defendant, appellant, Ruckman.*

CLARK B. WHEELER, *attorney in person, and* C. P. SHERMERHORN, *counsel for plaintiff, respondent.*

I. This cause having been tried by a jury, their findings must be deemed final and conclusive as to the facts; and on an appeal from the judgment thereon, none but questions of law can be discussed or reviewed. (*Code*, § 348; *Bulkeley* agt. *Keteltas*, 4 *Sandf.* 450, G. T.; *Brown* agt. *Richardson*, 1 *Bosw.* 402, G. T.; *Rider* agt. *The Union Insurance Co.* 4 *Bosw.* 169, G. T.; *Anthony* agt. *Smith*, 4 *Bosw.* 503, G. T.; *Clark* agt. *Ward*, 4 *Duer*, 206; *Marquart* agt. *La Farge*, 5 *Duer*, 559, G. T.; *Stettner* agt. *Granite Ins. Co.*, 5 *Duer*, 594, G. T.; *Ogden* agt. *Ooddington*, 2 *E. D. Smith*

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317, G. T.; *Keyes* agt. *Develin*, 3 E. D. Smith, 518, G. T.; *Hotchkiss* agt. *Hodge*, 38 Barb. 118; *Laback* agt. *Hotchkiss*, 17 Abb. 88; *Benedict* agt. N. Y. R. Co. 8 N. Y. Legal Observer, 168, G. T.)

"In the classes of cases before a referee, and before the court, power is expressly given to the general term by the sections quoted to review the questions of fact; but when the trial is before a jury, no such power is given and none exists." (*Parker* agt. *Jervis*, 34 How. 254, *Court of Appeals*.)

II. There are 29 exceptions taken by the appellant, but not one of them are available, because not sufficiently explicit, or because it was not taken to the decision of questions of law properly brought to the notice of the court at the trial, or because the comments of the judge at the trial are not the subject of an exception, or because he is not bound to charge the jury at all, and if he does, he is only bound to charge them correctly as far as he goes, or because no good reasons are given for each exception. (*Caldwell* agt. *Murphy*, 1 Kern. 416; *Dunkel* agt. *Wiles*, 1 Kern. 420; *Oldfield* agt. *Railroad Company*, 4 Kern. 310; *Magie* agt. *Baker*, 4 Kern. 435; *Dyckman* agt. *Mayor, &c.*, 1 Seld. on pp. 441 and 2; *Haggart* agt. *Morgan*, 1 Seldon, 422; *Jones* agt. *Osgood*, 2 Seld. 233; *Hunt* agt. *Maybee*, 3 Seld. 266; *Hart* agt. *Railroad Company*, 4 Seld. 37; *Howland* agt. *Willets*, 5 Seld. 170; *Winchill* agt. *Hicks*, 18 N. Y. R. on p. 565, and cases cited; *Walsh* agt. *W. Ins. Co.* 32 N. Y. R. on p. 440, *Haupt* agt. *Pohlman*, 1 Robt. 121; *People* agt. *Bransby*, 32 N. Y. R. 525; *Chamberlain* agt. *Pratt*, 33 N. Y. R. 47; *Newell* agt. *Doty*, 33 N. Y. R. 83; *Buck* agt. *Renssen*, 34 N. Y. R. 383; *Lyon* agt. *Mitchell*, 36 N. Y. R. on p. 683; *Mayor* agt. *Ex Fire Ins. Co.* 9 Bosw. 425, G. T.; *Varnum* agt. *Taylor*, 10 Bosw. 148, G. T.; *O'Hara* agt. *Brophy*, 21 How. on p. 382, G. T.; *Pettit* agt. *Ida*, 12 Abb. 44, G. T.; *Meyer* agt. *Goodell*, 31 Howard, 456; *Powell* agt. *Jones*, 42 Barb. 24, G. T.; *Walsh* agt. *Kelley*, 42 Barb. 98, G. T.; *Maybee* agt. *Fisk*, 326, G. T.)

III. The rule is uniform, that the court will not grant a new trial where the evidence is conflicting, or where it is seen that the facts proved are deemed by the jury conclusive of the case. Although errors may have been committed, yet, if the court is satisfied that justice has been substantially done, a new trial will not be granted. (*Lewis* agt. *Blake*, 10 Bosw. 198, G. T.; *Ooddington* agt. *Carnley*, 2 Hilton, 528, and cases cited; *Brower* agt. *Bowen*, 30 N. Y. R. 519, 542; *Hoagland* agt. *Wright*, 7 Bosw. 394; *Murphy* agt. *Boker*, 3 Robt. p. 1; *H. & N. H. Co.* agt. *N. Y. & H. Co.* 3 Robt 411; *Ball* agt. *Loomis*, 29 N. Y. R. 412.)

IV. The evidence offered by the appellant and ruled out was properly excluded. (*Berry* agt. *Mayhew*, 1 Daly, 54, G. T.; *Mackey* agt. *N. Y. Cen. R. R. Co.* 27 Barb. 528, G. T.; *Williams* agt. *Vanderbilt*, 29 Barb. on p. 504, G. T.; *Fleming* agt. *Smith*, 44 Barb. 554, G. T.)

V. A new trial will not be granted on the ground that a nonsuit was refused when the plaintiff rested, on insufficient evidence, if the necessary proof, satisfactory to the jury, was afterwards supplied. (*Artisans' Bank* agt. *Backus*, 31 Howard, 242, G. T.; *S. and S. Plankroad Co.* agt. *Thatcher*, 1 Kern. on p. 112; *Lansing* agt. *Van Alstyne*, 2 Wend. 561; *Briedert* agt. *Vincent*, 1 E. D. Smith, 542, G. T.; *Morrison* agt. *N. Y. &c. Railroad Co.* 32 Barb. 568, G. T.; *Merange* agt. *Morris*, 32 Barb. 650, G. T.)

VI. The papers from the marine court were properly excluded, because the general term, in this cause, had virtually directed it to be done, and because a defendant cannot give evidence of any fact not specifically and specially set up in his answer. Each item of defense must be specifically pleaded. The general issue (or general denial) is abolished. Production of the note upon the trial was sufficient evidence of title and ownership, until the contrary was shown by the appellant; and this question, too, was passed upon by the jury, (*Code*, § 149; *Wheeler* agt. *Ruckman*, 1

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Robt. 408, *G. T.*; *James* agt. *Chalmers*, 2 *Seld.* 209; *Bailey* agt. *Ryder*, 1 *Seld. Notes*, p. 15; *Kelsey* agt. *Weston*, 2 *Comst.* 501, *see* p. 506; *Codd* agt. *Rathbone*, 19 *N. Y. R.* 37, *see* p. 39; *Brazil* agt. *Isham*, 2 *Kern.* 9, *see* p. 17; *McKyring* agt. *Bull*, 16 *N. Y. R.* 297, *see* pp. 307-8-9; *Dieffendorf* agt. *Gage*, 7 *Barb.* 18, *see* p. 20; *Baker* agt. *Bailey*, 16 *Barb.* 54, *see* p. 57; *McMillan* agt. *S. Railroad Co.* 20 *Barb.* on p. 454; *Travis* agt. *Berger*, 24 *Barb.* 611, *G. T.*; *Button* agt. *McCauley*, 38 *Barb.* 413, *G. T.*; *Gould* agt. *Ellery*, 39 *Barb.* 163, *G. T.*; *Skinner* agt. *Stuart*, 39 *Barb.* 206, *G. T.*; *Toland* agt. *Johnson*, 16 *Abb.* 235, *see* pp. 239, 240; *Potter* agt. *Chadsey*, 16 *Abb.* 146, and cases cited; *Tuxier* agt. *Gowin*, 5 *Duer*, 389, *G. T.*)

VII. The attachment in the case of *Drury* agt. *Russell* was void, and the jury have decided that it came too late to affect the title of the plaintiff to the note. The action having been commenced by the service of a summons by publication against a non-resident debtor, the attachment could be of no avail until after the last day of publication mentioned in the order. All the papers in that action, too, were properly excluded at the last trial. (*Code*, §§ 99, 137, 237; 3 *R. S.* 5th ed, p. 84, § 38.)

"It is true, service could be made in such a case by publication; but a warrant of attachment would be of little avail in such a case, as it could only be enforced after the last day of publication, which completed such service. (*Code*, § 137; *Knox* agt. *Mason*, *MSS.* June 15, 1865, *Superior Court, G. T.* and cases cited; *Fisher* agt. *Curtis*, 2 *Sandf.* 660; *Kerr* agt. *Mount*, 28 *N. Y. R.* 659.)

VIII. The provisions of the Revised Statutes in relation to attachments against non-resident debtors harmonize with the Code. The lien by virtue of an attachment attaches from the time of the actual seizure of the property attached. This note was never levied upon. The summons in *Drury* agt. *Russell* had not been served when the attachment was pretended to be served, to wit, the next day after the attachment was issued. *Russell* resided in Virginia and *Drury* in New York. This, too, was fatal. An attachment is one of the provisional remedies of the Code, and the statute must be strictly followed. The rule is the same as it is in relation to serving an injunction. (*Code*, §§ 99, 137, 237, 471, title 7, § 178, &c.; *Fraser* agt. *Greenhill*, 3 *Code R.* 172; *Hurlbut* agt. *Hope Ins. Co.* 4 *How.* 275, *see* p. 278; *Moore* agt. *Thayer*, 6 *How.* 47, *G. T.*; *Tomlinson* agt. *Van Vechten*, 6 *How.* 199, *G. T.*; *Burkhardt* agt. *Sandford*, 7 *How.* 329, *see* p. 336; *Learned* agt. *Vandenburg*, 7 *How.* 379; *affirmed*, 8 *How.* 77; *Furman* agt. *Walter*, 13 *How.* 348; *Lawrence* agt. *Bank Republic*, 31 *How.* 502, *see* p. 504, *Court of Appeals*; *Yale* agt. *Matthews*, 20 *How.* 430, *G. T.*; *Gould* agt. *Bryan*, 3 *Bow.* 626, *G. T.*; *Leffingwell* agt. *Chave*, 5 *Bow.* 703; *Abrahams* agt. *Mitchell*, 8 *Abb.* 123; *Butler* agt. *Tomlinson*, 15 *Abb.* 88, *G. T.*; *Morgan* agt. *Avery*, 7 *Barb.* 656; *In re Aaron Griswold*, 13 *Barb.* 412, *G. T.*; *Parker* agt. *Smith*, 2 *Livingston's Law Magazine*, 770; *Hoffman on Provisional Remedies*, 436; *Kerr* agt. *Mount*, 28 *N. Y. R.* 659.)

IX. The property which can be levied upon by virtue of an attachment means such as is defined by the Code. A promissory note is a chose in action, and cannot be levied upon (unless it is seized and carried away), because it is capable of manual delivery. The indorsement of the note operated as an assignment, and therefore the note should have been seized, or else a certificate demanded; but nothing of the kind was attempted. (*Code*, §§ 231, 232, 234, 235, 463, 464; *Loftus* agt. *Clark*, 1 *Hill.* 310, *G. T.*; *Ransom* agt. *Miner*, 3 *Sandf.* 692, *G. T.*; *Marsh* agt. *Backus*, 16 *Barb.* 483, *G. T.*; *Insurance Co.* agt. *Railroad Co.* 41 *Barb.* 9, *G. T.*; *Wilson* agt. *Little* 2 *Comst.* on p. 447; *The Dry Dock Bank* agt. *Life Ins. Co.* 3 *Comst.* 344.)

X. No appraisers were appointed or inventory filed, or certificate was asked for or furnished. Their omission is fatal, and the question can be raised at any time by any one sought to be affected by the attachment. The affidavits upon which the attachment was granted, the undertaking and affidavits of justification, and notice

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of the attachment, in *Drury agt. Russell*, are entirely omitted from the appeal book, and therefore the papers cannot be noticed by the court on appeal. The appeal book does not show the grounds upon which the attachment was issued. (*Code*, §§ 232, 236, 194, 471; 3 *R. S.* 5th ed. p. 80, §§ 7 to 11 inclusive; *Van Alstyne agt. Erwine*, 1 *Kern*. 331; *Lyman agt. Cartwright*, 3 *E. D. Smith*, 117, *G. T.*; *Everton agt. Thomas*, 5 *How.* 45; *Ransom agt. Halcott*, 9 *How.* 119, *G. T.*; *Hoffman on Provisional Remedies* 426, 427, 456, 457.)

XI. The note passed to the plaintiff by indorsement, delivery and sale, more than twenty days before the attachment was issued, and therefore, even if it was valid it could not affect the plaintiff's title to the note. This fact, too, was passed upon by the jury. (3 *R. S.* 5th ed. p. 84, § 38; *Farmers' and Mechanics' Bank agt. Wadsworth*, 2 *A. Law Register*, p. 121; *Gould agt. Ellery*, 39 *Barb.* 163, *G. T.*)

XII. The plaintiff being the owner of the note, and Russell (the payee) having no property in this state when the attachment was issued, the judgment in *Drury agt. Russell* is void, and also the assignment from Russell to the plaintiff were properly excluded by the court, because the plaintiff makes title at a date prior to either of them. This, too, was passed upon by the jury. (*Code*, § 132; *Force agt. Gower*, 23 *How.* 194, *G. T.*; *Fiske agt. Anderson*, 12 *Abb.* 8, *G. T.*; *Skinner agt. Stuart*, 15 *Abb.* 391, *G. T.*; *McKay agt. Harrower*, 27 *Barb.* 463, *G. T.*; *Hall agt. Stryker*, 29 *Barb.* 105, *G. T.*; 27 *N. Y. R.* 596; *Siebert agt. The Erie Railway Co.* 49 *Barb.* 583; *Lomer agt. Meeker*, 25 *N. Y. R.* on p. 363.)

XIII. "Declaring a note to be good to one about to purchase it, or standing by in silence when it is transferred for consideration, is an estoppel in pais against a debtor." (2 *Parsons on Contracts*, 340, 793, 5th ed.; *Watson agt. McLaren*, 19 *Wend.* 557; *Foster agt. Newland*, 21 *Wend.* 94; *Rider agt. Union I. R. Co.* 4 *Bosw.* 169, *G. T.*; *Ryers agt. Farwell*, 9 *Barb.* 615, *G. T.*; *Cardwell agt. Hicks*, 27 *Barb.* 458, *G. T.*; *Hawley agt. Grinwald*, 42 *Barb.* 18, *G. T.*; *Brookman agt. Metcalf*, 34 *How.* 429, *Superior Court*, *G. T.*)

XIV. The dismissal of the complaint by Judge WOODRUFF (June 13, 1856), and the judgment for costs entered thereon, was no bar to a recovery here. His honor who presided at the last trial charged the jury correctly in this and all other respects. No error was committed in ruling out the judgment roll and case, and other papers, in *Wheeler agt. Lake & Ruckman*, or any other matter of defense. If his honor had ruled otherwise, he would have committed the same errors which were committed at the fourth trial, and for which errors in his ruling a new trial was granted (December 5, 1863) to the present respondent. No error was committed by his honor in charging the jury as he did, or in declining to charge them as requested by counsel for the appellant; and the cause having been tried the last time in accordance with the instructions and decisions sent down from the general term, the judgment entered upon the verdict must now be affirmed, with costs. (2 *Cowen & Hill's Notes*, 804 to 810, 971; 4 *Phillips' Evidence*, O. and H. notes, part 2, pp. 13, 40, 839, 840; *Harrison agt. Ward*, 2 *Duer*, 50, *G. T.*; *McKnight agt. Dunlop*, 4 *Barb.* 36; *Hotchkiss agt. Hodge*, 38 *Barb.* 117, *G. T.*; *Coit agt. Bland*, 22 *How.* 2, *G. T.*; *Dexter agt. Clark*, 22 *How.* 289, *G. T.*; *Wilcox agt. Lee*, 26 *How.* 418, *G. T.*; *Holbrook agt. U. and S. Railroad Co.* 2 *Kern.* 236, see pp. 244-5; *Audubon agt. Ex. Ins. Co.* 27 *N. Y. R.* 216; *Rider agt. Union I. R. Co.* 28 *N. Y. R.* 379; *Kerr agt. Rays*, 35 *N. Y. R.* 331; *Fay agt. O'Neil*, 36 *N. Y. R.* p. 11; *Williams agt. Birch*, 6 *Bosw.* 299; *People agt. Vilas*, 3 *Abb. N. S.* 252, *Court of Appeals*; *Wheeler agt. Ruckman*, 2 *Abb. N. S.* 186, *G. T.*)

ROBERTSON, Ch. J. The counsel for the defendant moved,
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on the trial of the issues of fact in this action, to dismiss the complaint, upon the ground that the former action in this court, mentioned in the answer, was a bar to this action, which the court refused, and an exception was taken by him to such refusal. He also requested the presiding judge to charge the jury that the plaintiff bought this note for prosecution, being a practicing attorney, and therefore could not recover upon it, which the judge refused and the counsel excepted. The presiding judge charged the jury that neither the judgment in the former action between the same parties, in this court, nor that in the action in the marine court, brought in the name of Russell, were bars to this action; to which instructions the defendant's counsel excepted. These are all the exceptions in the case upon the merits. The judgment in the former action in this court was no bar, because the complaint in it was merely dismissed, and the issues were never tried or a verdict of the jury given. (*Dexter* agt. *Clarke*, 22 *How.* 289; *Seaman* agt. *Ward*, 1 *Hill.* 52; *People* agt. *Vilas*, 3 *Abb. N. S.* 252; *Coit* agt. *Beard*, 33 *Barb.* 357; *Coit* agt. *Bland*, 22 *How.* 2; *S. C.* 12 *Abb.* 462.) The judgment in the marine court was also no bar, because it was a dismissal of the complaint for want of parties, and not on the merits.

The reversal seems to have had no other effect than to give the plaintiff in it costs, as it was never tried again. (*Anon.* 9 *Wend.* 503.) This judgment was also not set up in the answer as any defense; nor was any such defense set up therein as to the purchase by the plaintiff of such note for prosecution, although it had been in the former action in this court; so that no such defense was admissible on the trial. Besides, there was not enough evidence in the case to sustain a charge of a purchase for such purpose, if it had been set up as a defense.

The written agreement of the 3d of February, 1854, did not constitute a purchase of the note in question; the parol agreement of the 4th made it only partly one, and the plain-

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tiff was already employed to sue upon it. The assignment in December, 1854, was executed after the termination of the action in the marine court, and its objects and occasion fully explained.

The following questions were excluded on the trial; to whose exclusion the counsel for the defendant excepted:

1st. "Did you draw the complaint in this case?"

This was put to the plaintiff, in reference to the action in the marine court, brought in the name of Russell.

2d. "Did you not also on that trial claim that Robert P. Russell was the owner of the note?"

This also referred to the trial in the marine court.

3d. "Had you ever commenced any other suit for Robert P. Russell, prior to this note being left with you?"

None of the information sought by these questions was material. In fact, the first was answered by the plaintiff, testifying subsequently, that his brother drew *the complaint* inquired about, and he did not. In reference to the second, he stated that he employed counsel on such trial. Nor do I see that his claiming on the trial that Russell was the owner of the note, was more important than his acting as attorney in the suit in which he claimed it. That question was disposed of by this court when this case was before it formerly. (1 *Robt. R.* 408.) The fact of commencing or not commencing some other suit for Russell, before the note was left by him with the plaintiff, was wholly irrelevant.

The following question was put to the plaintiff, and its admission excepted to:

Q. "Did you ever at any time, in substance, make any claim to this note, other than that you became the owner on the 4th of February, 1854?"

But the exception became useless, because it was never answered, the plaintiff merely saying, in reply to which no objection was made, that he didn't "think he ever testified to that;" and so it appears by the case.

The defendant's counsel offered a copy of the case, pre-

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pared on the appeal from the judgment on a former trial of this action, claimed to be in the handwriting of the plaintiff, which the case before us states, showed an entire different statement by him from that made on the present trial. The fact that the case was in his handwriting can make no difference as to the admissibility of the evidence. The case itself is no evidence of what took place on the trial. (*Neilson agt. Columbian Ins. Co.* 1 *Johns. R.* 301.)

These are all the exceptions insisted on upon the argument. The jury passed upon the question of the transfer to the plaintiff on the 3d or 4th of February, 1854 (prior to the attachment in the *Drury* case), because it was expressly submitted to them, and they were directed to find for the defendant, if the note was not then transferred; and this fully defeated any claim under the *Drury* attachment.

There being no error in the charge or refusal to charge, or the admission or exclusion of testimony, the judgment should be affirmed, with costs.

I concur.—S. JONES.

SUPREME COURT.

GARRIT WAFFLE, respondent agt. JAMES H. GOBLE,
appellant.

The proof required to satisfy the officer granting an order of publication, that the party cannot, after due diligence be found within the state, must appear by affidavit. The return of a sheriff upon the summons, will not be considered as forming any part of such proof.

The plaintiff in the action, is a competent person to make the affidavit for an order of publication, as was decided in *Van Wyck agt. Hardy* (20 *How. Pr. R.* 222).

The statute does not prescribe who shall make the affidavit; but it must show that due diligence has been used; and that the person to be served cannot be found within the state, to the satisfaction of the court or judge.

The statute does not require the filing of the complaint in a case, where the defendant is served personally out of the state, soon after the order of publication is granted, and where no publication is made.

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Personal service of a copy of the summons and complaint, out of the state, is equivalent to publication and deposit in the post office. (*Code*, § 135.)

Where the summons is issued and an *attachment* levied upon defendant's property, more than *thirty days*, before the service of the summons and complaint upon the defendant out of the state, by which the action is deemed to have been commenced (no service by publication having been made), the attachment becomes wholly void, under section 227 of the Code, and will be set aside on motion. But the order of publication will be allowed to stand.

Seventh Judicial District, General Term, June, 1868.

Present E. D. SMITH, JOHNSON and J. C. SMITH, *Justices.*

APPEAL from order denying motion to set aside attachment and order of publication. The defendant was a non-resident of this state, and a resident of the state of Michigan. The summons, and a warrant of attachment against the property of the defendant were placed in the hands of the sheriff of Monroe county, on the 8th day of October, 1866, and on the same day the sheriff by virtue of such warrant, seized the defendant's property. On the 2d of January, 1867, the sheriff indorsed upon the summons; that after due and diligent inquiry by him made, he could not find the defendant within his bailiwick, to make service of process upon him. On the following day the plaintiff presented his own affidavit to the county judge of Monroe county, in which he set forth, among other things, that the defendant was his son in law, having married his daughter, and that in the fall of the year of 1864, he left his residence in this state, and removed to Van Buren county, in the state of Michigan, where he has since resided with his family. That the summons issued in the action could not be served by reason of the defendant's residence out of, and his absence from this state. That the deponent had searched for the defendant and endeavored to find him within the state at the time of commencing the action; and that by search and inquiry he had been unable to find him, and did not believe he had been within this state since the fall of 1864; and that he would be likely to know from the fact of the defendant being his son in law, and he having seen letters from him, the defendant. Upon this affi-

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davit being presented to the county judge, together with the sheriff's return upon the summons, that officer on the day last aforesaid, made an order for the service of the summons by publication, in which it is recited as follows: "It appearing to my satisfaction by the affidavit of the plaintiff, that a cause of action exists," &c., and "that the defendant cannot after due diligence, be found within this state," &c., "I do order," &c. After the granting of the order, and on the 8th of January, 1867, a copy of the summons and complaint were served personally on the defendant at his residence in the state of Michigan.

No complaint had been filed in the clerk's office. The motion to set aside the attachment and order was made upon three grounds: 1. That the affidavit on which such order was granted, does not show that effort was made to serve the summons, nor that the defendant could not be found, nor that any search has been made for him, nor that he was not in the state when the summons was issued. 2. That no complaint has been filed in said action. 3. That the order of publication of the summons was not obtained, and publication thereof commenced within the time prescribed by statute.

The motion was denied and the defendant appeals.

G. F. DANFORTH, *for appellant.*

M. S. NEWTON, *for respondent.*

By the court, JOHNSON, J. It is claimed by the appellant's counsel, that the judge who granted the order of publication had no right to receive or take into consideration the sheriff's certificate that he could not find the defendant in his county to make service of the summons upon him. It is also claimed that proof by affidavit, that the defendant to be served "cannot after due diligence, be found within the state," must be made by the officer, or other person who has the possession of the summons, for the purpose of making service. And

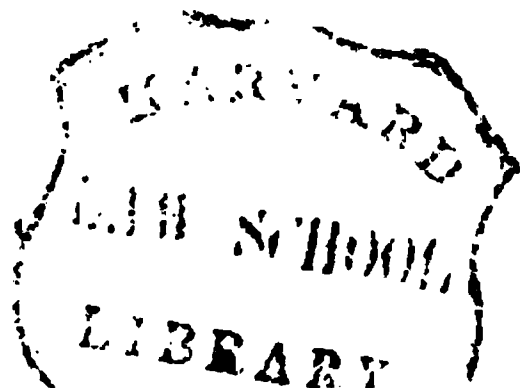
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that the affidavit of the plaintiff, who could not serve the summons, was not competent proof before the officer, to satisfy him that the defendant could not be found within the state. The statute provides what kind of proof shall be made to the satisfaction of the court or officer, granting the order of publication, that a party cannot, after due diligence, be found within the state. That fact must appear by affidavit. (*Code*, § 135.)

The return of a sheriff will not answer; that not being the kind of evidence which the statute requires. Nor could the essential fact be made to appear partly by affidavit and partly by a return. It must be made to appear by affidavit only. But although the return appears to have been presented with the plaintiff's affidavit, there is nothing to show that the judge who granted the order received, or acted upon the return as evidence. On the contrary the order recites that the fact appeared to his, the judge's, satisfaction by the affidavit of the plaintiff.

If the affidavit was competent as evidence, the presence of the return at the same time did not destroy or weaken its force. As to the competency of an affidavit by a plaintiff in the action for such a purpose, it was held to be competent and sufficient in *Van Wyck agt. Hardy* (20 *How. Pr. R.* 222). That was a general term decision, which it is our practice generally to follow. The statute does not prescribe who shall make the affidavit, but it must show, that due diligence has been used, and that the person to be served cannot be found within the state, to the satisfaction of the court or judge. In the present case it will be seen from the facts stated in the affidavit, in respect to the inquiries made, and the grounds of belief and knowledge that it furnishes far more satisfactory evidence of the defendant's continual absence from the state, than any proof of search by a sheriff or other officer, who was a stranger to him, could furnish.

As to filing the complaint in a case like this, I am of the opinion it is not necessary. Here the summons and com-



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plaint were served personally upon the defendant, within a short time after the order of publication was granted. The Code (§ 135) provides, that when publication is ordered, personal service of a copy of the summons and complaint out of the state, is equivalent to publication and deposit in the post office. The complaint by the same section, is to be "first filed" "in all cases where publication is made." And in that case "the summons as published must state the time and place of such filing." Here no publication was made, but the summons and complaint were served personally. The defendant having a copy of the complaint, there was no necessity of having it filed, where he could obtain a copy, or of a notice of the time and place of such filing, and the statute does not require it in such a case.

But the third ground of the defendant's motion presents a question of more difficulty. The summons, as has been seen, was issued and the attachment levied on the 8th of October, 1866. The service of the summons and complaint upon the defendant in the state of Michigan, which is made the equivalent for publication, after the order for a service of the summons in that manner has been obtained, was not made until the 8th of January, 1867, more than ninety days after the summons was issued. The order for the service by publication, was not obtained until the 3d of January, 1867, nearly ninety days after the issuing of the summons, and publication was never commenced. At the session of the legislature in 1866, section 227 of the Code, which gives the provisional remedy of attachment, was amended by adding to it as follows: "And for the purposes of this section, an action shall be deemed commenced, when the summons is issued, provided, however, that personal service of such summons shall be made or publication thereof commenced within thirty days." Previous to this amendment, it had been held by the court of appeals in *Kerr agt. Mount* (28 N. Y. R. 659), that an attachment could only be issued where an action was depending; and that an attachment issued where

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a summons had been issued merely, and not served, was void, the issuing of a summons not being the commencement of an action for general purposes. By referring to the section it will be seen, that this provisional remedy is given only "*in an action* arising on contract," &c. It must have the foundation of an existing depending action to stand upon, or it is a nullity. Of course there is no action in existence until one has been commenced according to law. This amendment to section 227, was doubtless made to remedy a defect, disclosed by the decision above referred to, and to render the provisional remedy by attachment, more efficacious than it would be, if the party were compelled to wait until the action was commenced by the actual service of a summons, before he could have his warrant of attachment. Hence, it was provided by the amendment, that for the purposes of that section (§ 227), in order to uphold and give effect to the warrant of attachment, the action should be deemed to be commenced when the summons was issued on certain conditions. Since the amendment, therefore, a warrant of attachment properly granted and served immediately after summons issued, and before service thereof, is "*in an action*," and is valid and effectual, provided always, that the conditions on which the issuing of the summons is deemed the commencement of the action, are subsequently complied with. In the present case the condition was not complied with, by personal service of the summons or the commencement of the publication thereof in thirty days. The question then arises whether, after the expiration of the thirty days, and between that time and the service of the summons and complaint under the order, this action was legally depending, so as to afford a support to the warrant of attachment.

This depends upon the effect of the proviso in the amendment. A proviso in a statute always implies a condition, unless modified by subsequent words. The difference between an exception and a proviso in a statute is that the first exempts absolutely from the operation of the enactment,

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whereas the latter only defeats the operation of the enactment conditionally. (*Bouv. Law Dic. tit. "Proviso," and cases there cited.*) A proviso is something engrafted on a preceding enactment, by way of limitation or otherwise, and is held to operate as a repeal of the purview of the act where it is inconsistent with it, as expressing the last intention of the law giver. (*Smith's Commentaries on Statute and Constitutional Law*, 712.) The effect of the amendment most clearly is, that in the particular case in which a warrant of attachment is properly issued, at the time of issuing the summons, or at any time afterwards, within thirty days, the action is deemed to be commenced and depending provisionally or conditionally only. If within the thirty days, however, the proviso or condition is not complied with, the action is no longer deemed to be commenced by the issuing of the summons, and the action is no longer depending. The warrant of attachment, consequently, being no longer "in an action" depending, has nothing to stand upon, and must necessarily fall. The subsequent steps within the thirty days are clearly jurisdictional matters, and must be taken in order to continue the pendency of the action, which is before then provisional only. This proviso is, in its character, quite like that attached to section 99. By that section, it is provided that the attempt to commence an action by the delivery of a summons to the sheriff or other officer of the county, with the intent that it shall be actually served, shall be deemed equivalent to the commencement thereof. But it also provides that such attempt must be followed by the first publication of the summons, or the service thereof, within sixty days. This has been uniformly held not to apply to the commencement of actions generally, but to actions in particular cases only. Supposing, in an action under that section, to save the statute of limitations, no subsequent steps should be taken after the issuing of the summons, would any one pretend that an action had been commenced for any purpose? I think not. By the proviso in the amendment in question,

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the legislature doubtless intended that a plaintiff should lose all benefit and advantage which might accrue from such a provisional remedy, unless he continued diligently and perfected the commencement of the action by the service of the summons in one of the ways provided for. It was not designed to give a plaintiff the privilege of seizing the defendant's property in advance, and holding it till it should suit his pleasure or convenience to proceed in his action. If the plaintiff, under this section, could hold the property ninety days before taking the subsequent steps, I do not see why he might not continue to hold it in the same way for years.

The plaintiff's counsel refers to section 139 of the Code, which provides that, from the time of the service of the summons in a civil action, or the allowance of a provisional remedy, the court is deemed to have acquired jurisdiction and to have control of all the subsequent proceedings. I do not see that this section has any particular bearing upon the real question involved in this case. The court undoubtedly acquired jurisdiction in the case by the allowance of the provisional order or warrant, after the suit was provisionally commenced by the issuing of the summons. But whether it retained such jurisdiction after the lapse of thirty days, when the action could no longer be deemed to have been commenced, is quite another question. It is obvious that in such a case the jurisdiction of the court must be provisional or conditional, as was the commencement of the action, and ceases the moment the law ceases to regard the action as having been commenced and to be depending. My conclusion, therefore, is, that the plaintiff having failed to comply with the statutory conditions on which the action was deemed to be commenced by the issuing of the summons, it must be deemed not to have been commenced until the service of the summons and complaint, under the judge's order, on the 8th of January, 1867. Up to that time no action had been commenced and none was depending, and the war-

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rant of attachment had nothing to support it, but was wholly void, and should have been set aside.

The defendant asked also by his motion to have the order of publication set aside; but I do not see why that was not regularly granted, under the general provision for the service of a summons upon a non-resident defendant, without any reference to the attachment. So far as that is concerned, the order appealed from is correct.

The order, therefore, so far as it refuses to set aside the warrant of attachment, should be reversed, and an order setting aside the attachment granted, and in other respects affirmed. No costs of the appeal allowed to either party.

SUPREME COURT.

FRANCIS PONTO, appellant agt. JAMES H. PHELPS, respondent.

Where a justice of the peace, under the provisions of section 371 of the Code, and after a written acceptance of an offer, upon appeal, to allow judgment for a certain sum, "makes a minute thereof in his docket, and corrects such judgment accordingly," but refuses to allow *disbursements and costs in the court below to the appellant*, the appellant may apply to the county court *by motion* and have such *costs taxed*, and judgment entered in his favor for the amount in the county court; and an appeal can be taken therefrom to the supreme court."

Syracuse General Term, June, 1868.

Before FOSTER, MULLIN and MORGAN, Justices.

On the 21st day of December, 1867, the above named plaintiff recovered a judgment against the above named

*NOTE.—The county court, therefore, under section 371 of the Code, has jurisdiction over the *costs and disbursements* of the appellant and the *power of taxation* thereof, and of entering judgment thereon, *on motion*; while the justice has jurisdiction of the judgment corrected in favor of the respondent, and the power to proceed to the collection thereof; because that section declares that, after the correction of the judgment accordingly, "the same so corrected shall stand as his judgment, and be enforced accordingly." It seems to be difficult to understand how the county court gets jurisdiction of any part of the case *by motion*, after the appeal is disposed of by the entry of a corrected judgment, which is to stand as the judgment of the justice.—R.R.P.

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defendant, in a justice's court, for \$60 damages and \$7.35 costs; in all \$67.35. On the 9th of January thereafter the defendant served a notice of appeal to the county court of Jefferson county, in which he offered to allow the judgment to be corrected and to stand and be enforced for \$40 damages and \$5.00 costs; in all \$45.00; and that he would pay that amount. This offer was accepted by the plaintiff, on the 14th of January, 1868, and notice thereof given to the defendant on the 15th January, who accepted the plaintiff's offer or acceptance; and thereupon defendant went before the justice and had him correct the judgment accordingly, and enter judgment for \$40 damages and \$5.00 costs. After this was done, as provided by section 371 of the Code, the defendant asked the justice to indorse on such judgment, so corrected as aforesaid, the further sum of \$12.20, which he claimed as his disbursements on appeal and costs in the court below. This the justice refused to do; when the defendant made a motion to the county court to have that court tax his costs and set them off against the judgment in the court below. The motion was heard before the Jefferson county court, February 4, 1868, and granted. The defendant's costs were taxed by the said county court at \$12.20, and a judgment ordered in his favor for that amount against the plaintiff.

From this order the plaintiff appeals to this court, and asks that the order of the county court be set aside, with costs, on the ground that the county court of Jefferson county had no power to hear the motion or make the order; for the reason—

First. That the action was not in the county court at the time the motion was made; and,

Second. The county court has no power to tax costs in any action; and,

Third. It can only order judgments in actions brought into that court by appeal, and there heard and decided; in

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which case the costs follow by force of law, and are to be taxed by the clerk, and not by the court.

N. WHITING, *attorney for plaintiff.*

I. I will first examine the force of the first objection, to wit., "that the action was not in the county court at the time the motion was made." At the time this motion was made, the justice had, as provided by section 371, corrected his judgment, undertaking and execution, and made the judgment \$40 damages and \$5.00 costs, in all \$45, which amount the defendant by his written offer had agreed to pay; and the justice then refused to make any further deductions, and would not allow the defendant the further sum of \$12.20, as he had no power to do so; and then the defendant makes this motion.

Now, section 371 of the Code provides that, when these offers are made and accepted, "the appellant *may* thereupon, and within five days thereafter, file with the justice a written acceptance of such offer, who *shall* thereupon make a minute thereof in his docket and correct such judgment accordingly, and the same so corrected shall stand as *his judgment*, and be enforced accordingly." And the execution to be issued thereon, and undertaking given, &c., shall all be corrected and enforced by the justice. I say, therefore, that the moment the appellant presented to this justice the offer and acceptance, and had the justice correct his judgment, it destroyed the force of the appeal and returned the whole proceedings to the justice's court, and the county court had no power over them any longer, and all proceedings had in them thereafter must be had in the justice's court.

The next objection is, "The county court has no power to tax costs in any action." That is a court of limited jurisdiction; and the power to do any act must be found in some statute, or they have no power. (1 *Code R. N. S.* 75; 5 *How.* 446; 15 *Abb.* 214.) And the power to do the act must affirmatively appear. It is not necessary to show want of power outside of the moving papers; the power must be shown affirmatively in the papers. (2 *Seld.* 176.) Now, it affirmatively appears in these papers that the judgment is and was in the justice's court when this motion was made, showing the entire want of power. But we go further, and show affirmatively that he has no power. Section 303 of the Code abolishes all former statutes in relation to costs, or fees, &c.; and section 311 authorizes the clerk of the court, on two or five days notice, to tax the costs and disbursements of the prevailing party, and enter the same in a judgment; and the clerk by this section can only tax costs, &c., in case of final judgment. Judge HARRIS, in 5th *How. Pr. R.* 5, says, "the clerk is the only officer authorized by the Code to tax or adjust costs;" and his authority is limited to cases of final judgment. (*See also* 6 *How.* 413; 4 *How.* 361; *Id.* 304; *to the same effect.*)

The clerk being the taxing officer in all the courts, I will now see in what manner and in what cases the court can examine into the question of costs. Judge HARRIS, in 8 *How.* 5, says "taxation of costs by a judge at chambers is a nullity;" and the amount of costs in in interlocutory proceedings should be fixed in the order granting them, or provide in the order for their being taxed by the clerk; and if none are provided in the order, none can be collected. Section 368 of the Code awards costs to the appellant on reversal, and to the respondent on affirmance. Section 369 provides for the court ordering restoration, where the judgment is reversed, after it has been paid; and section 370 authorizes the court, when, upon appeal, a recovery is had by one party and costs awarded to the other, to set one off against the other and to

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order judgment for the balance. We say, therefore, that the county judge had no power over these costs.

But it is claimed by the defendant that section 371 allows these costs and disbursements, and the power to enforce them must be somewhere. So much of section 371 as is claimed allows these costs reads as follows: "If the offer be made and accepted by the appellant, the appellant shall recover all his disbursements on appeal, and all his costs in the court below. But he shall not recover costs except as provided in this chapter." This section is found in chapter 5, beginning with section 351 and ending with 371; and sections 368, 369, 370 and 371 are the only sections in that chapter that say anything about costs. Section 368 awards costs to appellant on reversal, and to respondent on affirmance. Section 369 gives power of restitution, when judgment has been paid and afterwards reversed; and section 370 authorizes the court to set off costs against recovery, in case of appeal, where one party recovers and costs are awarded to the other. So that we find that neither of these three first sections authorize the costs in this case. Now, section 371 first provides for the offers made in this case, their acceptance, &c., and then says, the "appellant shall not recover costs, unless the judgment appealed from shall be reversed on such appeal, and be made more favorable to him to the amount of at least \$10." This part of the section evidently refers to cases where the appeal is taken and heard and disposed of in the county court, and does not therefore provide for these costs. But the section further provides that, "whenever costs are awarded to the appellant, he shall be allowed to tax as a part thereof the costs and fees paid the justice, and his disbursements, &c." Now, when are these costs and disbursements to be awarded? I answer, it is in cases provided for by section 368, to wit., "when the judgment is affirmed, that they shall be awarded to the respondent, and when reversed, to the appellant;" and the court has nothing to do with awarding them, the law itself awards them. (1 *E. D. Smith*, 398, 411; 12 *How.* 367; 2 *E. D. Smith*, 85.) It would seem, then, that these costs can only be awarded to the appellant when he reverses the judgment or reduces it at least ten dollars, and in this case he has done neither.

Now, section 371 further provides, that, "when the judgment in the suit before the justice was against the appellant, he shall further be allowed to tax the costs incurred by him which he would have been entitled to recover in case the judgment below had been rendered in his favor." This portion of the section also evidently refers to cases where the appellant entirely reverses the judgment, and final judgment is entered in his favor in the county court. This section starts off with the proposition that "costs shall be allowed to the prevailing party, in judgments rendered on appeal, in all cases, with the following exceptions and limitations;" and then goes on to provide for the statement in the notice of appeal, offer, acceptance, &c.; and then goes on to say the "appellant shall not recover costs unless the judgment appealed from shall be reversed or reduced at least ten dollars." In conclusion, I say, therefore, section 371 gives the appellant costs and disbursements on appeal when he reverses the judgment on appeal, or reduces it \$10, and gives him costs and disbursements in the court below when he entirely reverses the judgment of the court below, and final judgment is awarded in his favor on appeal. Judge WOODRUFF. in 4 *E. D. Smith*, 12, says: "When a judgment for the plaintiff is reversed in this court, without an award of judgment for the defendant upon the merits, the costs incurred by the defendant in the court below cannot be allowed to him." It would appear, therefore, that appellant, on reversal, cannot recover costs and disbursements in the court below, unless the county court order final judgment in his favor. So that the judgment will be a bar to another action. (*See* 4 *E. D.*

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Smith, supra.) This they will do when they can see he ought to have it, and ought to have succeeded in the court below.

From the notice of appeal, offer, acceptance, and entry of modified judgment, it appears, in this case, that the plaintiff was entitled to judgment in the court below; and he now has, by defendant's own acts, a judgment therein against the defendant of \$45, which most clearly shows that plaintiff was entitled to costs there; for, by section 2, laws of 1866, page 1482, it is provided, that, "whenever a judgment shall be rendered in a court of justice of the peace, in civil actions, it shall be with costs of suit;" and the same provision was in the laws of 1857 and the Revised Statutes, and both parties cannot, certainly, be entitled to costs.

Suppose A sues B on a note of hand for \$50; B defends; A obtains judgment for \$50 damages and \$5.00 costs; B brings an appeal, and states that the judgment ought only to be \$49 damages and \$1.00 costs; A does not want to go to the expense of a new trial in the county court, so he deducts the \$5.00 and accepts the offer, and the appellant then turns around and asks A to pay \$12.20, his costs and disbursements, as in this case. Or suppose the note is \$5.00; B defends, and A gets judgment for the note and \$2.00 costs; B appeals, and offers to allow judgment to stand for \$4.00 damages and \$1.00 costs; the offer is accepted, and B presents a bill of costs of \$12.20, as in this case, and demands that A pay him the difference. No one would pretend that this was justice or law, and yet that is just what appellant has done in this case. The law does not require any return in this case, and none is made. Why, then, should the plaintiff be forced to pay \$2.00 for a return, when none is wanted and none is made? I say, therefore, first, that the defendant is not entitled to his costs and disbursements, \$12.20; and if he is, the county court have no power to adjust them, and he must recover them by action, and not by motion.

Again, section 2d of the laws of 1866, page 1482, gives the prevailing party in a justice's court costs. The plaintiff prevailed in the justice's court, and under this law was entitled to costs. That ends the question of costs in the court below. As to the disbursements on appeal, none is necessary. The appellant may serve his notice of appeal on the justice and respondent, and pay no costs, and then hold on fifteen days, and if the offer is accepted, he can go before the justice and have the judgment corrected, without paying one cent; and if the offer is not accepted in the fifteen days, he has five days in which he can pay the justice his costs and for making the return, and the appeal goes on, and nothing is to be allowed for the disbursements on appeal; none are had, and none are necessary.

The order of the Jefferson county court should be reversed, with the costs of this appeal.

WELCH & FRANCIS, attorneys for defendant.

THE COURT ordered that the order of the county court appealed from be in all things affirmed, with \$10 costs. No written opinion was given.

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SUPREME COURT.

J. H. SEELEY agt. I. S. BLACK.

Proceedings supplementary to execution are proceedings in the action, not special proceedings, designated by the Code.

Consequently the proceeding by *attachment*, for a violation of an order in supplementary proceedings, is a proceeding in the action; and costs therein should be taxed as costs in the action, and not as costs of an action, which are allowed in special proceedings.

Seventh Judicial District General Term, June, 1868.

Present, E. D. SMITH, JOHNSON, and J. C. SMITH, Justices.

MOTION to amend order of general term.

The defendant was proceeded against by attachment, for the alleged violation of an order of the special judge of Monroe county, in proceedings supplementary to execution, in an action for the recovery of money, in the which the plaintiff obtained a judgment against defendant, on which execution had been issued and returned unsatisfied. A reference was ordered to take the proofs; and upon the hearing, the attachment, and all proceedings had thereon, were dismissed, with costs of the proceeding to be adjusted by the clerk.

From this order the plaintiff appealed to the general term, where the order was affirmed, with \$10 costs of appeal.

The defendant proceeded and had his costs taxed by the clerk, who allowed and taxed the defendant's costs of the proceeding as in an action. The plaintiff appealed from the taxation to the special term, on the ground that the proceeding by attachment in such a case was not a special proceeding, but a proceeding in the action. The judge at special term held that the proceeding was a special proceeding, and the defendant entitled to costs as in an action, up to the appeal to the general term, and granted leave to the defendant to move at general term to amend the order affirming the order of special term, by striking out of the same "with

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ten dollars costs of appeal," and inserting therein "with costs to be adjusted," to the end that he might have the costs of the appeal taxed as in an action.

The defendant now moves to amend the order accordingly, and for that purpose.

J. VAN VOORHIS, *for defendant.*

E. HARRIS, *for plaintiff.*

By the court, JOHNSON, J. Whether this motion should be granted or not, depends upon the question whether the proceeding by attachment against the defendant in this case was a special proceeding or a proceeding in the action, and a part and parcel of the remedy embraced by the action. The order claimed to have been violated was contained in the order for the examination of the defendant, concerning his property, in proceedings supplementary to execution, which forbid his transferring or disposing of his property until further order. By the Code, all remedies are divided into actions and special proceedings. An action is defined to be an "ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." "Every other remedy is a special proceeding." There has been some conflict in the decisions as to the character of proceedings supplementary to execution, whether they were special proceedings or proceedings in the action. But whatever may have been decided elsewhere, the court in this district has uniformly held that such proceedings were proceedings in the action, and we shall probably adhere to this until the question shall be settled the other way by the court of last resort. That we have been right in this will appear very plain by reference to the Code. Title 9 of the Code is entitled "Of the execution of the judgment in civil actions." It consists of two chapters. Chapter 1 is entitled "The execution," and

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provides when it may be issued, when it shall be made returnable, the different kinds, the form, &c., and regulates generally the proceeding of issuing the same. Chapter 2 is entitled "Proceedings supplementary to execution," and provides for the proceeding after the execution has failed in executing the judgment. These proceedings are always entitled in the action, and are most obviously as much a part of the machinery which the law has provided for enforcing the right involved in the action, and the execution of the judgment, as the execution itself. It is made so by the Code, upon its face, and in express terms. The proceedings supplementary, being proceedings in the action, the proceeding by attachment for a violation of the order was so likewise.

The proceedings as for contempt, to enforce civil remedies and to protect the rights of parties, in civil actions, are by attachment, and are familiar to every lawyer. They are always, as in this case, entitled in the action, and are used, and always have been, as part of the machinery belonging to the action, to protect the right therein involved, and to aid in enforcing the remedy. Such an attachment could not be had, nor the proceeding to obtain it maintained, outside of an action. It has its foundation in the action alone, and can only be used as one of the means or instruments of the action to enforce the remedy and secure the right. It is, as it always has been, part and parcel of the armament, so to speak, of every action, to be used whenever its use may become necessary in furthering the ends of such action.

The Revised Statutes which regulate such proceedings (*tit. 13, ch. 8, part 3, p. 534*) is entitled "Of proceedings as for contempts, to enforce civil remedies and to protect the rights of parties in civil actions."

This question is, I think, settled by the decision in the court of appeals, in *Pitt agt. Davison* (reported in 34 *How. Pr. R.* 355), in which it is expressly held that such proceedings to punish as for contempts, for the disobedience of judg-

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ments and orders, are proceedings in the action. If they are proceedings in the action, they are not the special proceedings designated in the Code. The special proceedings there referred to are proceedings other than in actions. It is a remedy given to enforce or protect a right without action, and not in aid of or as part of the proceedings in actions. This appears to my mind extremely clear. It is apparent that it would operate most harshly, and add excessive burdens to litigation, if it were to be established that all these collateral proceedings in actions, used to aid in enforcing the right which the action is brought to establish and enforce, and in executing the judgment, were special proceedings, in which costs as of actions are to be allowed, independent of the costs of the action in which they were used. No such practice has ever yet obtained, and I think we should set our faces most determinedly against it.

The proceeding was a proceeding in the action in the nature of a motion, and the defendant is only entitled to costs of motion.

The motion to amend the order must therefore be denied.

SUPREME COURT.

GEORGE M. GRIFFEN and others agt. ORVILLE BROWN and
LUCIUS S. SMITH.

Where the plaintiffs sued to recover of the defendants \$500 for the lightering and storage of grain, and the defendants interposed a counter-claim for more than that amount for wastage and conversion of the grain, and claimed a balance in their favor, and the referee, on adjusting the claims on each side, found in favor of the plaintiff a balance of *five cents*, *held*, that the plaintiffs were entitled to *costs*.

Albany Special Term, August, 1867.

MOTION by plaintiffs to set aside judgment for costs, in

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this case, entered for defendants, and to award costs to plaintiffs, upon the report of the referee therein.

S. F. HIGGINS, *for plaintiffs.*

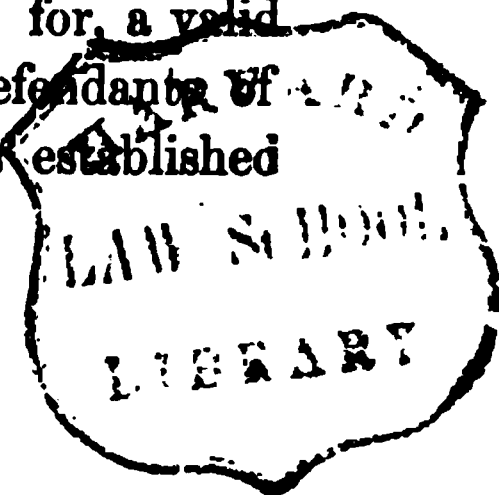
H. HARRIS, *for defendants.*

HOGEBOOM, J. The plaintiffs in this case sued to recover for lighterage and storage of grain for defendants about the sum of \$500, and by the report of the referee established their claim, with interest, at nearly that amount.

The defendants, admitting the lighterage and storage of a large quantity of the grain, claimed in their answer that a considerable quantity of the grain was never returned to them, but lost or wasted or converted by plaintiffs, and claimed that plaintiffs should account and pay for the deficient quantity; that such amount should be applied in payment and discharge of the plaintiffs' claim, and the defendants have judgment for the excess.

The referee allowed most of the defendants' claim; found that a certain portion of the grain that went into defendants' possession was lost by shrinkage and waste, and that nearly 1,000 bushels were unaccounted for, for which quantity the referee charged the plaintiffs at the market price, with interest, amounting *within five cents* to the amount of the plaintiffs' claim; *for which sum of five cents* the referee reported in favor of the plaintiffs. The defendants, supposing themselves, under this state of facts, to be entitled to costs, taxed the same at over \$100 against the plaintiffs (the plaintiffs objecting thereto), and entered judgment therefor against the plaintiffs; and the plaintiffs now move to set aside the judgment, for costs, and for an order adjudging that the plaintiffs are entitled to costs.

I think it quite clear that the plaintiffs are so entitled. They established at the trial, and were allowed for, a valid and subsisting claim or account against the defendants of over \$400, and nearly \$500; and the defendants established



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to the satisfaction of the referee a set off or counter-claim of over \$400, and nearly \$500, and within five cents as much as the plaintiffs' demand.

Both of these were subsisting and independent demands, and could have been prosecuted for as such affirmatively in a court of justice. There was no payment or application of either upon the other until such application was made by the referee, with the consent of the law, and of the defendants on the trial of the cause. If there was any conversion or other tort, for which the defendants could have prosecuted the plaintiffs, it was virtually, if not expressly, waived by the act of the defendants in their answer, and upon the trial, asking compensation from the plaintiffs, and the application of the amount thus obtained upon the plaintiffs' demand. Both demands were therefore matters of account, within the meaning of section 54 of the Code, whereby a justice of the peace is excluded from entertaining jurisdiction "where the sum total of the accounts of both parties, proved to the satisfaction of the justice, shall exceed four hundred dollars." In this case the causes of action of each party (plaintiffs and defendants) exceeded that sum, and I can perceive no authority for saying that a justice of the peace would have had jurisdiction, unless the parties had voluntarily relinquished a portion of their demands. This it would have been unsafe for the plaintiffs to do; for the defendants, not relinquishing any portion of theirs, could have prosecuted in an independent action in a court of record, and recovered the whole amount of their demand; or, if obliged to set off in the justice's court, must have recovered a judgment against the plaintiffs over and above the plaintiffs' demand, for an amount equal to the sum relinquished by the plaintiffs, as the amount of their respective claims was equal, or so within five cents. (*Stilwell* agt. *Staples*, 3 *Abb.* 365; 5 *Duer*, 691; *Matteson* agt. *Bloomfield*, 10 *Wend.* 555; *Mills* agt. *N. Y. Com. Pleas*, 10 *Wend.* 557; *Brady* agt. *Disbrow*, 2 *E. D. Smith*, 78; *Par-*

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ker agt. *Eaton*, 25 Barb. 122; *Gilleland* agt. *Campbell*, 18 How. 177.)

The case of *Crane* agt. *Holcomb* (2 Hilt. 269), if it is to be regarded as adverse to this view, is against the weight of authority. But it was disposed of upon different considerations and under a different statute. 1. The question arose under the act conferring jurisdiction upon the district courts of New York (1 *Laws of 1857*, p. 707), which is different in language and legal effect. 2. It was decided *mainly* upon the effect of subdivision 4 of section 304 of the Code, which gives costs to the plaintiff of course in actions for the recovery of money, where the plaintiff shall recover \$50, and section 305, which gives costs of course to the defendant, in the actions before mentioned, where the plaintiff is not entitled to costs therein.

The other cases cited by defendants' counsel, *Trust* agt. *Person* (3 Abb. 84) and *Peet* agt. *Worth* (1 Bosw. 653), are without much bearing on the present question. The first merely decides in effect that an action to enforce a lien, as presented by the complaint then before the court, was an action for the recovery of money, and must be determined, in regard to costs, by subdivision 4 of section 304. And the last was a case strictly within that subdivision; at least, it does not bear upon the present question.

It is upon section 305, and the 4th subdivision of section 304, that the argument of defendants' counsel in this case is based; and if subdivision 4 of section 304 was the only one to be considered, the defendants would be right. But the several subdivisions of that section (304) must be considered in connection with each other, and each must be allowed to have force. Subdivision 3 of section 304 gives costs to the plaintiff, upon a recovery (for any amount), "in the actions of which a court of justice of the peace has no jurisdiction." This is an action of that kind, and must be construed, I think, to allow the plaintiffs costs, notwithstanding subdivision 4 provides for costs to the plaintiff, in actions for the

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recovery of money, where he recovers fifty dollars; and section 305 gives the defendant costs, where the plaintiff is not entitled to them. There is no other way of harmonizing subdivisions 3 and 4, or of making both of them operative, but by allowing full force to subdivision 3 in all cases to which it is applicable, and limiting the operation of subdivision 4 to cases which are not covered by subdivision 3.

I have no doubt this is in accordance with the intent of the legislature, as it seems plainly to be with the weight of authority.

The plaintiffs, therefore, and not the defendants, are entitled to costs; and as the defendants have insisted upon taxing costs in their favor, and entering judgment therefor, I think the motion must be granted, with \$10 costs.

N. Y. SUPERIOR COURT.

WILLIAM F. HAWKINS agt. CLIFFORD PEMBERTON and another.

Where an article sold by an auctioneer was called by him "*blue vitriol*," which was open to inspection," but evidently was so termed as being its commercial designation, or as being a vitriol of a blue color (which it was), in either case there was no warranty of anything, even though the auctioneer stated that the article "was sound and in good order," and the article in fact was an *inferior article of blue vitriol*.

The term "sound" applies to *condition* only, not to quality or kind, and is opposed to *defective, decaying or injured*. The article sold was evidently sound as *inferior blue vitriol*, and there being no question but what it was in *good order*, there was no deception practiced upon the purchaser, although he alleged that he purchased it under the representations of the auctioneer as merchantable blue vitriol.

General Term, April, 1868.

Before ROBERTSON, Ch. J., BARBOUR and GARVIN, Justices.

ON the 16th day of January, 1867, Messrs. Burdett, Jones & Co., a responsible house of auctioneers, sold twenty-five casks of blue vitriol at auction.

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The vitriol belonged to the plaintiff, and the auctioneers were employed by the plaintiff to sell it.

Some of the casks were opened from an hour to two hours before the sale, and were examined by the defendants, and appeared to be merchantable blue vitriol. Looking at blue vitriol, you cannot tell whether it is adulterated or not. The auctioneer stated, when he offered it for sale, "*here are twenty-five casks of blue vitriol, sound and in good order.*"

The defendants purchased twenty-three casks, at eight cents per pound, on the faith of the representations made and the cursory examination they were able to make before the sale.

The defendants, after the sale, took specimens to their own office, and laid them on their sample table. The next morning they found that these samples had turned nearly all white on the surface, and a dirty green shade in the body of the material.

The defendants had specimens analyzed, and found that it contained about twenty-five per cent of blue vitriol and seventy-five per cent of sulphate of iron and sulphate of zinc.

There is no means of detecting this, except by chemical analysis, until the substance has been exposed to the air from ten to twelve hours, when it will effloresce, and the sulphate of iron turn white.

Before such exposure to the air it had all the appearance of merchantable blue vitriol. The twenty-five per cent of vitriol in it was its greatest value.

Sulphate of iron was worth about one and a half cent per pound. Merchantable blue vitriol was worth at that time about eight and a half to nine cents per pound. This cost the plaintiff three and one half cents per pound.

On the 17th, the day after the sale to them, the defendants notified the auctioneers that they declined to take the vitriol, upon the ground that it was not what it was represented to be.

On the 22d the plaintiff caused it to be resold on account

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of the defendants, when it sold for about four and half cents per pound.

The second purchaser was cheated, and swears it is not worth anything and has no market value.

The plaintiff then brought this suit to recover the difference between the defendants' bid and the amount it realized on a re-sale.

The defendants answer—

First. That the plaintiff, when his agents, the auctioneers, represented it to be "*twenty-five casks of blue vitriol, sound and in good order,*" warranted it to be so.

Second. That the representations so made were false and fraudulent.

After the evidence was all in, his honor the judge directed the jury to find a verdict for the plaintiff for the amount claimed, subject to the opinion of the court at general term.

The defendants requested his honor to submit the questions to the jury—

First. Whether or not the plaintiff, when he represented this article to be "blue vitrol, sound and in good order," intended to warrant it to be so.

Second. Whether or not the plaintiff, when he made this representation, knew that it was not true.

Third. To submit the whole case to the jury upon all the questions in it.

The court refused each of such requests, and the defendants excepted.

R. S. EMMETT, *for plaintiff.*

IRA D. WARREN, *for defendants.*

1. The court erred in not submitting the question to the jury, whether or not, when the plaintiffs represented this to be twenty-five casks of blue vitriol, sound and in good order, he intended to warrant it.

No particular form of words is essential to constitute a warrant of quality. Any assertion of the vendor, if relied upon by the vendee and understood by both parties as an absolute assertion, amounts to a warranty, and should be enforced as such (*Sweet agt. Bradly*, 24 Barb. 549; *Roberts agt. Morgan*, 2 Cow. 438; *Wilbur agt. Cart-right*, 44 Barb. 536.)

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The question, whether the words used were understood and intended by the parties as a warranty, is a question of fact for the jury, and should be left to them to determine. (*Duffee* agt. *Mason*, 8 *Cowen*, 25; *Whitney* agt. *Sutton*, 10 *Wendell*, 412; *Cook* agt. *Moseley*, 13 *Wend.* 277; *Stryher* agt. *Bergen*, 15 *Wend.* 490; *Rogers* agt. *Acherman*, 22 *Barb.* 134; *Blakeman* agt. *Mackay*, 1 *Hill.* 266.)

II. The words used did amount in law to a warranty, and had the question been left to the jury, and they had found it to be a warranty, their finding would have been sustained.

In *Cook* agt. *Moseley* (13 *Wend.* 277), the seller said: "The mare is not lame, and I should not be afraid to warrant her." Held a warranty.

Carley agt. *Wilkins* (6 *Barb.* 557), the seller said: "The flour is superfine, and worth a shilling a barrel more than common." Held a warranty of quality.

Holman agt. *Dord* (12 *Barb.* 336), the seller said: "They are French goods, new, and in good order." Held a warranty.

Blakeman agt. *Mackey* (1 *Hill.* 266), the seller said of oysters: "They are good, and in good order." Held a warranty.

A general warranty of *soundness* covers every defect, unless they are such as could be discerned by an ordinary observer without *particular skill*. (*Birdseye* agt. *Frost*, 34 *Barb.* 367.)

The parties in this case represented the vitriol to be "*sound and in good order*," while it had a latent defect which destroys it on being exposed to the air for twelve hours, and which no human skill can detect, without a chemical analysis, until it had been so exposed to the air. It was sold at auction, with no opportunity for a chemical analysis, and he now seeks to exonerate himself from liability in any way. If that can be done, it would be so repugnant to the feeblest sense of common justice as to require all former rules of law to be at once overturned and a rule established more consonant with the common sense of the commercial world. But we submit that the doctrine claimed by the plaintiffs cannot be sustained on principle nor authority.

III. We submit that the court erred in not directing a verdict for the defendants, or at least in not submitting the question of fraud to the jury; for fraud is to be made out from circumstances.

There is evidence that the plaintiff knew the character of the thing he sold.

The casks were only opened and exposed to the atmosphere about an hour before the sale.

He bought it at three and a half cents per pound, currency, while merchantable blue vitriol at the same time was worth eight and a half to nine cents per pound. This fact alone raises a presumption that he knew the character of the article.

The court of appeals say: "If the price paid is entirely below that of a sound article, a presumption would arise that the purchaser was apprised of the defect," (*Hoe* agt. *Sanborn*, 21 *N. Y.* 566. See opinion.)

Therefore, we say upon those two facts we were entitled to go to the jury upon the question whether or not the plaintiff knew the character of the article he was selling.

It was not necessary, however, to show that the plaintiff knew its character, to establish fraud. "One who, without knowledge of its truth or falsity, makes a material representation, is guilty of fraud as much as if he knew it to be untrue, and that even if the fraud is committed by plaintiff's agent." (*Bennett* agt. *Judson*, 21 *N. Y.* 238.)

Applying this rule to the case at bar, the defendants were entitled to a verdict.

There is no dispute about the fact that the representation that the vitriol was "*sound and in good order*" was false. It was not "*sound and in good order*"

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when it contained a latent defect that would develop itself by twelve hours exposure to the atmosphere, so as to render it worthless. We say, therefore, that the defendants were entitled to a verdict on this ground.

IV. A clear distinction is to be found between this and all the cases cited by the plaintiff. The court will observe that in none of those cases was a word said about the soundness or condition of the article sold.

It was simply selling an article which had no latent defects about it, but which was just what it appeared to be, viz., an inferior stone for a *bezoar* stone, *help* for *barilla*, &c. The court simply decided that there was no implied warranty from the name under which it was sold.

We apprehend the decision would have been different in those cases, if the seller had said at an auction sale, here is a quantity of *barilla*, "*sound and in good order*," and it had proved to have been three-quarters *help* and one-quarter *barilla*, so prepared that no human skill could detect it by examination, or in any manner, except by chemical analysis, or by exposure to the atmosphere for several hours, when it would work its own destruction.

Therefore, we say that that class of cases has no application to the facts of this case, in any aspect of it.

In those cases, had there been any evidence, however feeble, to go to the jury, that the defendant knew that his statement in regard to the article he was selling was false, the court would have submitted the question of fraud to the jury.

V. The court should order a new trial, or render judgment for the defendants, with costs.

ROBERTSON, Ch. J. The merchandise which is the subject of controversy in this case was, according to the testimony of a chemist (Pohli), examined on the trial, a chemical compound, either of sulphuric acid, with three metals (*copper*, *iron* and *zinc*) and two earths (*alumina* and *lime*), in various proportions, or of salts composed of sulphuric acids and those metals and earths, in the form of sulphates. It appears to have been homogenous throughout, and was sold in its natural state, as manufactured, without any disguise or adulteration. It was known as *Salzberger* vitriol, in Germany, where it was manufactured, and as *mixed vitriol* in this country, among chemists. It does not appear to have had any specific commercial designation here, except as being some kind of vitriol, a name which is common to all the salts formed by the union of sulphuric acid with copper, iron or zinc, which are only distinguished by the names of their color. That term, "*vitriol*," being derived from the Latin (*vitrum*), expressive of its hardness and crystalline form, was first applied to the proto-sulphate of iron, from which "oil

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of vitriol," or *sulphuric acid*, was probably first obtained. (*Ure's Dict. Chem. and Min.*) But strange to say, after being distinguished from *blue vitriol*, or sulphate of copper, by the term *green*, it was still sometimes called *copperas* or sulphate of copper (*Dana's Dict. of Min.*); and *copperas* was even appropriated to it in chemistry and mineralogy (*Ure's Dict. in Verb.*), although it is also used to designate both the real sulphate of copper and sulphate of zinc. (*Long's Pen. Cycl. in Verb.*) And as its principal use was in tanning, dyeing and other manufactures, or making Prussian blue or ink (*Dana Dict. of Min.*), and blue vitriol or sulphate of copper was similarly used, those who dealt in them were probably not very careful to distinguish the two kinds, except as to their quality. The article in question sold was actually of a blue color. One of the defendants (*Pemberton*), on his cross-examination, testified that there were different qualities and grades of *blue vitriol*, and that the amount of impurity constituted the difference in quality. Sulphate of copper, with a *stight* admixture of sulphate of iron, would commercially be called *blue vitriol*. One of the samples of that sold to him he said he would call *blue vitriol, with a mixture*. This merchandise was termed in the invoice "blue vitriol, second quality," and in the bill of lading, sulphate of copper.

The article sold was therefore vitriol generally of a blue color, although of inferior quality, which, with the confusion of designations *for* it or *of* its component elements, fully justified the auctioneer (as agent of the plaintiff), in speaking of it, with the casks open for examination, as *blue vitriol*. He certainly would have been equally wrong in calling it *green*, or even *copperas*, which is sometimes applied to both kinds of sulphates indiscriminately, as has been shown. It would have been very difficult, even on a warranty that it was *blue vitriol*, to have established, from the testimony before us, that it was not. Its grade was a different thing. It was not adulterated sulphate of copper, any more than it

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was either adulterated or improved sulphate of iron. Such adulteration could not change its name. (*Holden agt. Dakin*, 4 J. R. 421.) It was apparently a homogenous substance, composed of various elements into which it could be resolved, not a mere conglomerate. It did not in fact appear whether the chemists who analyzed it obtained the quantities of salts of which a metal was the basis separately in a normal condition, or whether they merely discovered such an amount of the different metals as, with the sulphuric acid contained in the composition, would form those qualities of those salts

There was, therefore, no artifice or disguise used to conceal the real character of the article sold from the defendants, nor any imposition practiced. The casks were open a sufficient time to permit its being handled and ocularly inspected. One of the witnesses for the plaintiff (Webster) found it a mixed lot, some being of a greenish tinge, but "*it looked like merchantable blue vitriol.*"

There was evidence that went to show that the presence of iron could be detected by inspection, by the greenish shade it imparted.

There was no evidence in the case that the plaintiff knew the article sold to be anything else than it appeared to be, or that it was not pure unmixed sulphate of copper; for I cannot regard the mere smallness of price to be such.

The defendants did not produce as a witness the person, if there was one, upon the faith of whose information they swore in their answer that the substance "was mixed and put up by the plaintiff, or some person to him known, for the purpose of cheating and defrauding the purchasers thereof." If there was no such person, they are responsible to their consciences, at least, for having so sworn. Suffice it to say there was no evidence of fraud, and no request was made to submit the question, if there had been any, to the jury.

It is hardly necessary, at this late day, to discuss the question whether the vendor of an article, present and exposed to the examination of purchasers at the time of its sale, is

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liable for their applying a wrong name to it or giving a false description of it, or even doing so in a bill of parcels afterwards, where there is neither fraud nor warranty in the sale. Every case decided in this state, from *Seixas* agt. *Woods* (2 *Caines*, 48), where peachum was sold as *brazeletto* wood, and *Sweet* agt. *Colgate* (20 *J. R.* 196), where *kelp* was sold for *barilla*, down to the latest, has sustained the doctrine of *caveat emptor* in such a case. (See cases collected in 4 *Abb. Dig. Sales*, § 70.)

The affirmation made at the sale, in this case, that the article was "sound and in good order," even if it were a warranty, was true. The only defect found was a supposed dampness, which was not proved to be unsoundness. And one witness (Webster) testified that the casks were "*in good order*." The term "*sound*" applies to *condition* only, not quality or kind, and is opposed to *defective*, *decaying* or *injured*. The liability of such compound to effloresce, when exposed to the air, was not a *defect*, because it was a natural quality of the sulphate of iron, which was one of its elements. The article in question was evidently sound as *inferior blue vitriol*. If those had been the words used, there could have been no pretext for a defense; and yet the plaintiff was not bound to add the quality of the article, to prevent his being bound by a warranty that it was the best. It was *blue vitriol*, even if it was of an inferior quality. Whether an assertion is a warranty, when all the facts are admitted, is a question of law for the court, not for the jury. Every positive assertion as to the qualities or character of an article, made in the course of a negotiation for the sale of it, except as to value or condition, capable of being discovered by inspection, intended and adopted to induce the buyer to purchase, is a warranty. If plainly so adopted, taken by itself, it must be shown to have been accompanied by some qualifying words or acts, showing it to be a mere expression of opinion, in order to prevent its being a warranty. The question of intent, when doubtful, in such cases, is the only

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one for the jury, upon all the facts. In the three cases cited by the defendants' counsel (*Cook* agt. *Mosely*, 13 *Wend.* 277; *Carley* agt. *Wilkins*, 6 *Barb.* 557; *Holman* agt. *Dord*, 12 *Barb.* 336), the court held as matter of law that the character of the assertion showed it to be a warranty, and intended as such.

There was no dispute about the facts in this case. The article sold was called by the auctioneer "*blue vitriol*," but evidently was so termed as being its commercial designation, or as being vitriol of a blue color (which it was). In either case there was no warranty of anything.

There having been no question to submit to the jury under the evidence, and no error committed in the admission of evidence complained of, judgment must be given for the plaintiff for the amount of the verdict, with the costs of the action and the hearing.

SUPREME COURT.

EMMA HOFFMAN agt. WILLIAM HOFFMAN.

Special Term, June, 1864.

Before LEONARD, Justice.

WHITING & SCHIEFFELIN, *for the motion.*

JOHN F. BAKER *and* THOS. G. SHEARMAN, *opposed.*

THIS was an action for a limited divorce, which has been pending for some months. The plaintiff now moved, upon voluminous papers, for leave to file a supplemental complaint, alleging adultery, and praying an absolute divorce.

The court denied the motion, on the ground that the causes of action were incompatible, and that the complaint, if allowed, would be demurrable.

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SUPREME COURT.

JAMES MCGREGOR, JR., agt. ANN G. MCGREGOR and others.

Where the object of the action was to *state the account* of the plaintiff with the *trust fund*, and to *discharge* the plaintiff *from the trust*; and accordingly the plaintiff, in the complaint, gave his version of the transaction, claiming to have paid over the whole amount into the hands of his co-trustee, except what he had paid over to the beneficiary of the fund, and showed how this had been done, and asked his discharge:

Held, that it was competent for the defendants to falsify such statement, by the allegations in the answer, not only by a direct denial of the allegations in the complaint, but by *affirmative allegations*, showing a disposition and present condition of the fund different from that which the plaintiff insisted upon. And unless this object in the answer had been so clumsily and ineffectually accomplished, it was error to strike out a large portion of its allegations, as containing wholly *irrelevant matter*.

Upon a motion to strike out matters in an answer for *irrelevancy*, which is the only ground stated in the motion papers, the court ought not to consider only incidentally any other question, such as whether the matter sought to be stricken out forms the whole or a material part of a defense or a counter-claim. These questions only properly arise upon demurrer, or on the trial of the action.

As a general rule, the validity of a defense to an action is not to be tested by a motion to strike out.

Sham and *irrelevant* defenses may be stricken out, and matter of the same description may be stricken out on motion, or may give occasion for a motion for judgment notwithstanding the answer. But the matter must be *palpably* sham or irrelevant.

Albany General Term, September, 1865.

Before HOGEBROOM, MILLER and INGALLS, Justices.

APPEAL from order at special term, striking out certain portions of answers as irrelevant. The facts are stated in the opinion of the court.

M. I. TOWNSEND, *for plaintiff, respondent.*

GARDNER STOW, *for defendants, appellants.*

By the court, HOGEBROOM, J. This is an appeal by the defendants, Ann G. McGregor and Duncan McGregor, from an order of the special term, striking out as irrelevant certain portions of their answers, respectively. These answers, though separate, are sufficiently alike, in regard to the matters involved in the motion, to enable them to be considered

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together. As the motion to strike out embraces a large portion of the contents of the answers, it will be necessary to examine both the complaint and the answers with some detail.

The relief sought by the complaint is to establish and settle the plaintiff's accounts as trustee; to relieve him from the duties of the trust; to direct him as to the disposition of the trust moneys remaining in his hands or to be accounted for by him; to declare satisfied a certain mortgage from the plaintiff to Gregor McGregor; and to obtain such other relief as should be proper.

The facts upon which this relief is sought, briefly stated, are that one Gregor McGregor, deceased in 1845, made his will, whereby, in the 7th clause thereof, he bequeathed to his brothers, James McGregor, Jr., and Duncan McGregor (plaintiff and one of the defendants) a fund of \$2,000, upon *trust*, to pay over the income thereof to Ann McGregor (one of the defendants), wife of Alexander McGregor, during her life, and after her death, without children, to her husband during his life, keeping the fund invested on bond and mortgage in their names as trustees; and in case of her death, leaving children, to pay over the principal of the fund to the next of kin of Alexander living at the time both she and her husband shall have died.

That in 1846 the executor of said Gregor McGregor, deceased, paid over to the plaintiff said trust fund of \$2,000, as follows: \$400 thereof in a certain mortgage called the Conklin mortgage, and mentioned in said will as a part of the trust fund; also a mortgage from the plaintiff to Gregor McGregor, of \$1,291.46, with interest, also mentioned in the will as a part of the trust fund; and the remainder of said sum of \$2,000 in cash.

That said Duncan McGregor having requested the plaintiff to put said trust fund in his hands, the plaintiff, in accordance therewith, on the 26th of February, 1850, assigned to him a mortgage given by one Francis Myers to the plaintiff,

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whereon there was due nearly \$1,000, \$539 whereof was assigned by plaintiff and received by said Duncan as a part of the trust fund; the balance thereof being assigned to pay a debt of the plaintiff to said Duncan. Plaintiff also delivered to said Duncan the said mortgage of the plaintiff to Gregor McGregor, there being then due thereon \$1,341.10, and the said Duncan still holds same as such trustee. That plaintiff paid to Ann McGregor the interest on the fund up to 12th November, 1851.

That in 1852 Ann McGregor and her children, Gregor McGregor and Gardner McGregor, commenced a suit in the supreme court of this state against the plaintiff, the defendant Duncan, and against Alexander McGregor, alleging that the trust fund had been invested in lands in the state of Iowa, and claimed as relief therein that the Iowa lands should be adjudged to be the trust fund. That Duncan McGregor answered, concurring with the plaintiffs therein in desiring the same judgment. That the plaintiff answered, denying the investment of the trust funds in Iowa lands. That in March, 1855, the supreme court adjudged that no part of the trust funds were in Iowa lands, and that the fund was still in the hands of the trustees. That appeals were subsequently taken to the general term of the supreme court and to the court of appeals, and in both of said courts the judgment affirmed; the latter judgment being entered about 10th of October, 1862, and the remittitur filed in the supreme court on the 18th of October, 1862, whereby it became the judgment of the latter court. That pending the appeal in the court of appeals, Alexander McGregor died, leaving a will, wherein Duncan McGregor was appointed executor, and as such executor he was substituted as a party in said suit in the place of the said Alexander McGregor.

That since the fall of 1852 the said Duncan and Ann G. McGregor ever have been and now are so much at variance with the plaintiff that he cannot discharge his duty as such trustee, in connection with said Duncan, advantageously to

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said trust, on account of the extreme hostility of said Duncan and Ann to the plaintiff.

The answer of Duncan McGregor sets forth in substance as follows (the portions moved to be stricken out being embraced in brackets):

That Gregor McGregor died in New York in 1845, leaving a will bequeathing to defendant and James McGregor, Jr., a fund of \$2,000, in trust for Ann and Alexander McGregor and their children, in the 7th and 8th clauses thereof.

(1st.) [That previous to the making of said will Alexander resided at Prairie Du Chien, in Wisconsin, insolvent, which was the probable reason of the *trust*, instead of a direct bequest to Alexander. That in 1845 Alexander had purchased certain lands in the county of Clayton, Iowa (describing four several parcels), the title to which was in the plaintiff, but for Alexander's benefit. That he had also purchased certain other lands in Clayton county, Iowa (describing five other parcels), the title to which was taken in the name of plaintiff and defendant, but at the instance and for the benefit of Alexander, and were to be conveyed to him upon request. Alexander and one Burnett, who owned the two first pieces in common, established a ferry from them across the Mississippi river to Prairie Du Chien. Alexander agreed to purchase of Burnett his interest therein for \$1,500, and applied to plaintiff and defendant for the money necessary to effect the purchase; and they, after consultation, agreed that plaintiff should send to Alexander \$1,500 for such purpose, which, with \$500 lent by James to Alexander, would be equivalent to the \$2,000 trust fund, and this should constitute the trust fund, and James should have for his own use the original \$2,000 trust fund. Accordingly, James sent out the \$1,500, and Alexander used it for the purchase aforesaid, taking title in name of James, but for Alexander's benefit. In 1846 James received the \$2,000 original trust fund, and applied same to his own use. The lands in Iowa rose

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in value and became worth about \$100,000; and James being applied to, about July, 1847, to convey them in trust, denied and repudiated the agreement, and refused to perform. The result of this was hostile feelings between the parties, and danger of expensive and angry litigation.]

(2d.) [To restore amicable relations], and to avoid litigation, and to make a final investment of the trust fund, said James of the one part, and Ann and Alexander for themselves and their children of the other part, agreed, in November, (3d.) [1851, to settle and compromise all their difficulties on these terms:

[1. James should quit-claim to Ann all his interest in lands at Prairie Du Chien, in Wisconsin, and McGregor, in Iowa (describing the lands in Wisconsin and Iowa).

[2. James should assign to Ann a mortgage of Alexander to Gregor McGregor, executed in 1842, for \$4,000, to which Alexander became entitled as residuary legatee under the will of Gregor McGregor, deceased.

[3. James should assign to Ann a certain land office certificate, issued to S. B. Olmsted, by him assigned to plaintiff in trust for Alexander, who paid for the lands therein mentioned.

[4. James should endeavor, as Ann's agent, to purchase for her the King lot, in Iowa (describing same).

[5. The ferry and appurtenances should be the property of Ann.

[6. Ann should execute to the plaintiff her note for \$4,500, payable six years after date.

[7. On payment of said note, plaintiff should execute to said Ann a deed of conveyance for all of said lands.

[8. James and Alexander should execute to each other mutual receipts in full of all claims and demands.

[9.] Ann should execute to plaintiff receipts for the interest which had accrued on said trust fund of \$2,000, as if same had been regularly paid, although none had ever been paid.

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10. Plaintiff was to apply to some court in the state of New York to obtain an order to discharge from the trust the trustees under McGregor's will, and to substitute persons resident in Iowa.

11. Ann should execute a mortgage on certain of the lands (numbering them), with a bond to the trustees for the trust fund of \$2,000, the interest payable semi-annually, so as to constitute the investment thereof in conformity with the McGregor will.

To carry into effect the compromise and settlement, plaintiff, by deed of 10th November, 1851, conveyed to Ann all his interest in the lands last mentioned, and numbered 1, 2, 3, 4, 5, 6, in Iowa, and (4th.) [by another deed of November, 1851, the lands in Wisconsin herein described next preceding the lands in Iowa as numbered. Plaintiff also assigned to Ann, by writing of Nov. 17, 1851, the Olmsted land office certificate; which deeds and assignment were deposited with George D. Gardner, of Iowa; to be delivered to Ann when her note was paid. Plaintiff also, by writing of November 15, 1851, assigned and delivered to Ann the aforesaid mortgage of Alexander to Gregor McGregor. Ann delivered to plaintiff the sum to enable him, as her agent, to purchase for her the King lot; and plaintiff, about 30th November, 1851, purchased same, paying thereon (of Ann's money) \$20, and giving his obligation for the residue, which consisted of certain claims of McGinnis, liens on said land. Plaintiff, in further fulfillment of said agreement, did, sometime in November, 1851, deliver to Ann all the personal property belonging to the ferry. Ann executed and delivered to plaintiff her promissory note, dated Nov. 15, 1851, payable in six years after date, with annual interest. Alexander and the plaintiff executed to each other receipts in full of all claims and demands.]

Ann executed and delivered to the plaintiff receipts for the interest on the aforesaid bequest of \$2,000, as having been

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paid to her by the trustees, though in fact they had paid her nothing.

In March, 1852, in further execution of the agreement, plaintiff obtained an order of the supreme court of New York, granting leave to have trustees of the fund invested there (probably a clerical mistake, as the other answer reads, to have trustees of the fund appointed in Iowa, and to have the fund invested there), pursuant to the McGregor will, and to discharge plaintiff and defendant from the obligation of the trust. Under said order, Ann procured the appointment in Iowa of Samuel Murdock and George D. Gardner as trustees under the will, in lieu of those named in the will.

(5th.) [Though the whole trust fund was in plaintiff's hands, he has not paid over same, or any part thereof, to said Murdock and Gardner, or either of them. Before the maturity of the note, Ann and Alexander were advised by counsel, and by defendant, that the agreement between plaintiff and defendant, for investment of trust fund, was valid, and could and ought to be enforced against plaintiff and the lands, and that last aforesaid agreement for a final settlement was of no effect, and would not bind the minor children of Alexander; wherefore, to protect their rights, an action was commenced, about 25th December, 1862, in supreme court of New York, in which Ann and her children were plaintiffs, and James and Duncan and Alexander McGregor were defendants, to determine whether the trust fund was in fact invested in said lands, according to said agreement. The action was finally determined in the court of appeals, where it was held that the trust fund was not so invested. Said action was commenced so early that it was hoped it might be ended before the maturity of said note, and so that, if determined adversely to plaintiff, said Ann could pay said note and otherwise perform said agreement; but said cause was protracted so that the decision of the court of appeals was not rendered till October, 1862. Said Ann was advised that it would be imprudent and unsafe

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to pay said note during the pendency of said action, and therefore she did not pay it. Afterwards, on further reflection and advice, she did, in 1859 or 1860, offer to plaintiff to pay it, and tendered the amount due, and demanded a deed; but plaintiff refused said offer, tender and demand.]

After the decision of the court of appeals, and in December, 1862, said Ann executed to said Murdock and Gardner, trustees, her bond for said trust fund of \$2,000, with interest; the mortgage being on the lands which, by the agreement of 1851, were to be conveyed to her by the plaintiff, being an ample security for said fund.

(6th.) [After said agreement of 1851 for a final settlement, Alexander and Ann made expensive improvements, on buildings and otherwise, on said lands, which greatly enhanced their value.]

Pending said action, and about 12th December, 1858, Alexander died, leaving said Ann and said children him surviving, and leaving a will appointing G. D. Gardner, F. D. Bissell and defendant executors, and Ann executrix, whereby he devised all his real estate to his executors and executrix in trust to pay debts and legacies, among which is a large legacy to defendants Gregor and Gardner. Said will was duly admitted to probate in Clayton county, Iowa, in February, 1859, and letters testamentary thereon issued. Alexander had also real and personal property in Warren county, New York, and defendant obtained letters testamentary there, and is the only legal representative of deceased in New York. By said will, the property of deceased in New York was devised and bequeathed to defendant in trust. The mode proposed by the agreement of 1851, for securing said trust fund, would effectually secure same, and conform to the will of McGregor as to its investment.

Defendant prayed as affirmative relief that (7th.) [said agreement on final settlement be specifically performed; the deeds by plaintiff to Ann, left with Gardner, to be delivered to her on conditions, be confirmed as valid, conveying said

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estate on payment of \$4,500, with interest due thereon] that the bond and mortgage executed by Ann for \$2,000, with interest, and delivered to Gardner and Murdock, as trustees, be confirmed as the legal investment of the trust fund under the McGregor will; that in such event the defendant be discharged from the trust and of all obligations arising therefrom; or that such other relief be afforded as is proper.

Defendant denies specifically each and every allegation in the complaint inconsistent with or contradictory of the matters above set forth, and every allegation affecting prejudicially the equities herein set up.

The object of the action is to state the account of the plaintiff with the trust fund, and to discharge the plaintiff from the trust. To accomplish that object, it is essential to ascertain the condition of the fund when it came into the hands of the plaintiff, what changes (if any) it has since undergone, what has been done with it by the plaintiff, and what is the present amount and character of the assets and in whose hands they are, at least, whether they are in the hands of the plaintiff. Accordingly, the plaintiff, in the complaint, gives his version of the transaction; claims to have paid over the whole amount into the hands of his co-trustee, except what he has paid over to the beneficiary of the fund, and shows how this has been done, and asks his discharge.

It is of course competent for the defendants to falsify this statement by the allegations in the answer, not only by a direct denial of the allegations in the complaint, but by affirmative allegations showing a disposition and present condition of the fund different from that which the plaintiff insists upon. This, I think, was (in part, at least) the object of the answers. It remains to see whether it has been so clumsily and ineffectually accomplished that a large portion of the answers should be struck out as containing wholly irrelevant matter.

The scope of the answers seem to be:

1. To show that, by an agreement made between the

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trustees and the beneficiaries of the trust, about 1845 or 1846, a sum of money equal in amount to the principal of the trust fund was to be and was advanced by the plaintiff to Alexander McGregor, to be invested and was invested in Iowa lands and ferry rights, thereafter to constitute the trust fund under the will; and that in consideration thereof the plaintiff was to have the original trust fund as his own private property.

2. To show that, owing to hostile feelings engendered between the plaintiff and the beneficiaries of the fund, growing out of an alleged refusal on the part of the plaintiff, in 1847, to carry that agreement into effect by conveying the Iowa property (the title to which had been taken in his name, but in trust for them) to them, this agreement was abandoned and a new one in 1851 substituted therefor, between the plaintiff of the one part, and Ann and Alexander McGregor for themselves and their children of the other part, the object of which was, among other things, to restore amicable relations, to avoid litigation, *and to make a final investment of the trust fund.* This new agreement was in substance that the plaintiff should transfer to Ann McGregor certain securities; should convey to her certain lands in Iowa and Wisconsin, which conveyance should be made and become absolute on the payment by said Ann of a note of \$4,500 executed by her to the plaintiff, and payable six years after date; that mutual receipts in full should be executed between James and Alexander McGregor; that Ann should execute to the plaintiff receipts in full for the interest of the trust fund, though no payment of said interest had been in fact made; that an application should be made to the courts of New York for a discharge of the trustees named in the will and the substitution as trustees of persons resident in Iowa; and that said Ann McGregor should execute to the trustees her bond a mortgage upon a portion of said lands, for the trust fund of \$2,000, which should constitute the investment thereof under and in conformity with

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the McGregor will. The answers proceed to aver actual performance of most of the provisions of this agreement; indeed, I believe all of them which contemplated a then present performance.

Before the maturity of the note, according to the averments in the answer, the said Ann and Alexander were advised that this agreement was of no effect and not binding on their children (who were infants), and that the first agreement (of 1846) was valid and ought to be enforced. They brought an action to test this question, and it was decided adversely to such alleged agreement. This decision, it was hoped, would have been made prior to the maturity of the note, but it was not made until 1862, and having been advised that it was unsafe to pay the note until such decision, she did not pay it at maturity. Afterwards, however, in 1859 or 1860, she offered to pay, tendered the amount, and demanded a deed; all which were refused by the plaintiff. After the decision in the court of appeals, and in December, 1862, she executed to the Iowa trustees the bond and mortgage to secure the trust fund. Pending the action, Alexander McGregor died, and Duncan McGregor, as his executor, was made a party defendant in his place.

The answers ask as affirmative relief, that the agreement (of 1851) be specifically performed, the amount so invested in Iowa declared a legal investment of the trust fund under the will, and for further relief.

The *first* matter stricken out by the order appealed from is that which alleges the substitution of Iowa property for the original trust fund, the appropriation of the latter to the plaintiff's own use, the taking of title to the Iowa property in the name of the plaintiff, and his subsequent refusal to convey same in trust for the beneficiaries.

Considered by themselves, it cannot be denied that these allegations were material by way of defense, and could not properly be struck out as irrelevant. Taken in connection with the fact subsequently averred both in the complaint

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and answer, that the court held that the trust fund had not been transferred to Iowa, either because no such agreement had been made, or the agreement was invalid, the matter did not thereby become *irrelevant*, however much its force as a defense might be thereby impaired. If the fact were as the defendant alleged, that the agreement (of 1846) was actually made, and that another agreement (of 1851) was substituted therefor, it cannot be said to have been *irrelevant* to have alleged the facts just as they took place, in the order of their occurrence.

The *second* matter stricken out by the order is contained in the words "to restore amicable relations between the parties." This is alleged as one of the objects of the substitution of the agreement of 1851 for that of 1846, and in immediate connection with the fact that the refusal of the plaintiff to perform the agreement of 1846 had engendered hostile feelings between the parties. I do not regard the matter as *wholly* irrelevant, and certainly not as matter by which the plaintiff is *aggrieved*, the more especially as the plaintiff had distinctly averred as one of the grounds for seeking a release from his trust relations that unfriendly feelings existed between these very parties. If this were a proper averment, it could not be out of place in the defendants to aver the contrary.

The *third* matter stricken out is that which alleges the *substituted* agreement of 1851, or a *part thereof*.

I think this matter was relevant and material: 1. Because it alleged the *existing* agreement and understanding between the parties in relation to the trust fund; 2. Because it showed substantially, in connection with subsequent averments, that it was yet in the plaintiff's hands, or liable to be accounted for by him, on account of his not having performed his part of the agreement; 3. Because, thus connected, it showed that the plaintiff was not entitled to the judgment which he sought, and that the allegations in the complaint were not true; 4. Because, in the matter thus

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proposed and ordered to be stricken out, the plaintiff has *emasculated* the matter of the defendant's defense, striking out portions of a distinct defense and leaving in other portions, as for example, among the latter, that it was agreed that Ann should execte to the plaintiff receipts for the interest which had accrued on the \$2,000 as if regularly paid, though in fact not paid. This matter, if material, as I think it was, was entitled to stand in the defendant's answer, as it was therein alleged as a *part* of an agreement embracing other important matters, and not as if it was a distinct and *disconnected* averment by itself.

The *fourth* matter stricken out is that which alleges the partial performance, by both parties of the agreement of 1851, or of a *part thereof*.

The same remarks apply to this as to the last previous matter. If the latter is entitled to stand, then this should be, for the allegations are closely connected and more or less dependent upon each other. If the question be, whether this is a valid and existing agreement between the parties, it cannot be *irrelevant* to aver *partial performance* thereof, as well as the *original making* of the agreement. To this matter, also, the remark is especially applicable; that the plaintiff on moving to strike out, and procuring the order of the court to that effect, has *dissected* a series of allegations having direct connection with and dependence upon each other—allowing some of them to stand, and striking out others—thus placing the defendants before the court in a false position, and different from that which they had assumed in their answer. For example, the plaintiff allows the allegation to stand; that on execution of the agreement (of 1851), the plaintiff conveyed to Ann all his interest in the lands in Iowa, and strikes out the allegations directly following and connected therewith; that he also conveyed to Ann certain other lands in Wisconsin, and that these deeds (instead of being delivered) were deposited with George D. Gardner of Iowa, to be delivered to Ann when her note was paid. So, also, the alle-

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gation is allowed to stand, that Ann executed and delivered to the plaintiff receipts for the interest on the \$2,000, as having been paid to her, though in fact not paid, while other allegations are stricken out, showing how and for what reason such receipts were executed, and that they were in execution of an agreement containing other important and dependent provisions.

The *fifth* matter stricken out is that which alleges an excuse by Ann, for not meeting and paying her note of (\$4,500) at maturity, to wit: advice that the agreement under which it was given, was invalid, and that the former agreement (of 1846) was operative; the institution of a suit to determine this latter question; advice that it was imprudent and unsafe to pay that note until such suit were ended; nevertheless, a subsequent offer to pay, a tender of the amount, and demand of a deed, with all which plaintiff refused to comply.

I think this matter was not irrelevant. Defendants set up this agreement (of 1851) as an existing and operative one between the parties, and of which they asked a specific performance. It was not irrelevant to show an excuse for not performing it in some respects in point of time, strictly according to its terms, and a subsequent tender of performance.

In connection with this matter thus stricken out and immediately preceding it in the answer, is an allegation also stricken out that though the whole trust fund was in plaintiff's hands he had not paid over any portion of it into the hands of the Iowa trustees. The allegation in regard to the appointment of these trustees in place of those named in the will, is permitted to stand. If so, the allegation that the plaintiff had retained the whole trust fund in his hands, and had not paid over same to the Iowa trustees, ought, I think, also to stand.

The *sixth* matter stricken out is a clause stating, that after the agreement of 1851. the beneficiaries made expens-

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ive improvements upon the property contemplated to be held in trust for their benefit.

If specific performance was proper relief for the defendants to ask, it was allowable to state this fact as a reason for it; if the agreement were in any way proper to be maintained. I do not see why this fact, as contributing to such a result, was not proper to be stated. If the other matter is to stand, I think this should do so; and being unprejudicial to the plaintiff, I see no occasion for striking it out, unless all the allegations in regard to the agreement respecting the trust fund, are stricken out, in which case it would probably be incongruous as not connected with any subject matter in the answer.

The *seventh* matter stricken out is such portion of the relief sought, as asks a specific performance of the agreement of 1851, and the delivery of the deeds (held in escrow) upon payment of the \$4,500 note. The propriety of this prayer depends upon the question whether any matter relating to that agreement, shall be allowed to stand in the answer. If it is so allowed, then the prayer, whether proper to be stated or not, should be allowed to remain, as it would be a very rigid and uncommendable exercise of judicial power to refuse to a party permission to pray for such relief, as he believed to be proper upon the facts alleged. It is only in the event that all the previous matter supposed to be objectionable, that it would be admissible to strike out this prayer, as wholly inapplicable in any point of view to the facts alleged, and therefore, likely to confuse and mislead.

On the whole, I am of opinion that all the matter objected to should be allowed to stand, and that the order should be reversed.

In coming to this conclusion, I have confined myself to an examination of the matter stricken out, on the single ground of *irrelevancy*. This is the only ground stated in the moving papers, and the only one we ought to consider.

I have, therefore, not considered, except to a very slight

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degree, the question whether the matter stricken out forms the whole or a material part of a defense, or a counterclaim. Such questions only properly arise upon demurrer, or on the trial of the action, unless the matter objected to be palpably frivolous or irrelevant to any possible issues in the action, presented by the papers. As a general and almost universal rule, the validity of a defense to an action, is not to be tested by a motion to strike out. It is true, *sham* and *irrelevant* defenses may be stricken out. And matter of the same description may be stricken out on motion, or may give occasion for a motion for judgment, notwithstanding the answer. But the matter must be *palpably* sham or irrelevant. It would infringe unwarrantably upon legal rights, if any other interpretation were put upon these sections of the Code.

Nor is it necessary to determine absolutely, whether the matter objected to be sufficient to operate as the foundation of a counterclaim, or of affirmative relief, although it is certainly plausible to say, that a party who asks to have his accounts finally settled, and to be discharged absolutely from the trust, may first be asked to consummate any valid contract, which he has made in regard to the trust fund. But it suffices, if the matter objected to be in any wise proper as a *defense* (of any description) to the action, or in any wise relevant to such a defense.

Nor have I considered the question whether the offensive matter, or matter of a like description, has been stricken out by order of the court, from a previous answer in the same action. The motion is not founded upon that ground, and the facts stated in the affidavit do not raise that question. With the papers on this motion there have been, however, handed to the court the former answer put in in 1863, with the portions marked as stricken out by the order then entered, and also the brief opinion then written granting the motion to strike out. It certainly appears that some of the matter then stricken out, was substantially similar to some of that

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embraced in the present order. . But from an inspection of the opinion it will be seen, that the decision was not made altogether upon the ground, that the matter was irrelevant or redundant, but upon the ground that it was *either* of that character *or* so loosely and inartificially pleaded, that it ought not to stand. The relevancy of the matters alleged, did not clearly appear, either in the mode of presenting them in the pleading, or on the argument of the motion, and the order to strike out was granted (as appears by the opinion), without prejudice to put in an amended answer, showing the falsity of the matters set forth in the complaint, or the possession by plaintiff of additional (and it might have been added "or different") trust funds, besides those stated in the complaint, or the possession of them under a different, new or substituted trust—or seeking pertinent relief adapted to such a state of facts.

The reservation, I think, was, as it was doubtless intended to be, sufficiently broad to enable the defendant to incorporate in a pleading properly framed, matters containing a plausible defense, so as to enable the adverse party to test the validity thereof by demurrer; or, if not constituting by themselves, a separate and independent defense, to enable the court to test their validity or sufficiency on the trial of the action.

I think this has been done in the present case, with sufficient effect properly to protect them from a successful motion to strike out for *irrelevancy*.

In my opinion, the order appealed from should be reversed with costs, but without prejudice to a demurrer on the part of the plaintiff to the answer, or to such portions thereof as he shall be advised; and the plaintiff is allowed twenty days after a copy of the order entered on this motion is served on him to interpose such demurer, or to reply to said answer as he shall be advised

MILLER, J., concurred.

INGALLS, J., dissented.

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COURT OF APPEALS.

CALVIN GOODWIN, appellant agt. MARY NELIN, respondent.

Where a *contract* for the purchase of a lot of land is conditioned that a conveyance is not to be given until the terms of the contract are performed, by the payment of the whole purchase money, \$500, in yearly payments, and at the expiration of the time for the payment of the whole there remains a balance due and unpaid of \$200, and the vendor thereupon declares the contract void, and proceeds in an action of ejectment and gets possession of the premises, the vendee and those under whom he claims, never having paid or tendered the amount due upon the contract, have no claim legally or equitably to the title of the premises.

September Term, 1867.

THIS action was originally commenced by Jonathan Goodwin, who died, and by his last will and testament gave all his right, title and interest in the subject matter in controversy to the present plaintiff, Calvin Goodwin; and the suit has been continued in his name.

The complaint set forth that one Francis Hunt had a contract, in writing, with one Albert G. Bristol, for the purchase of a piece of land in the city of Oswego, for the sum of \$500; that said Bristol had covenanted and agreed with said Hunt that, on payment of said sum and the interest thereon, he would convey the said land to him by a good deed, in fee simple; that said Hunt, during his lifetime, had paid the whole amount of said purchase money, and had fully performed all the covenants on his part required by said contract; that said Hunt took possession of said premises, and retained possession thereof until his death; that upon his death, the defendant, Mary Nelin, a sister of said Hunt, took possession of said premises, to the exclusion of the other heirs of said Hunt, and retained the same. The complaint further stated that proceedings had been instituted by the administrators of said Hunt, before the surrogate of Oswego county, for the sale of the real estate of said Hunt; that such sale was ordered and had, and that on such sale the said

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Jonathan Goodwin had become the purchaser thereof, and had received a deed therefor.

The complainant prayed that the defendant might be ordered and adjudged to deliver up said contract and receipts therein mentioned; might come to an account for all moneys paid by her on account of said purchase, if any; might also account for the rents and profits of said premises, and might be decreed to deliver up the possession thereof; or for such other relief as the said plaintiff might be entitled to.

The action was tried by the court without a jury, and the following facts were found:

First. That said Francis Hunt, sometime between the years 1845 and 1850, contracted to purchase of Albert G. Bristol, of Rochester, the piece of land mentioned in the complaint, on the north end of block No. 86, in the city of Oswego, for the sum of \$500, part of which was paid down, and the remainder was to be paid in yearly payments; said Bristol to give a deed therefor on the payment of all the purchase money at the times when the same became payable, according to said contract; that the contract by its terms was to become void on failure *to pay according to its terms*; and possession was taken of said lot by said Hunt. The purchase money all became due before September 20th, 1852; and at that date there remained due and unpaid on said contract \$200 of principal, besides interest, which moneys so due have not been paid or tendered to said Bristol, or to any one else.

Second. That said Francis Hunt died on the 16th of September, 1851, intestate, leaving Denis Nelin and Mary Nelin in possession of said lot; that such proceedings were had before the surrogate of Oswego county that, on the 11th day of May, 1853, letters of administration upon the estate of said Francis Hunt were issued to Catharine Oats and Thomas Hunt, they executing the usual bond in such case; that such proceedings were thereafter had on the application of said Catharine Oats, before said surrogate; that afterwards,

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on the 6th of February, 1854, the said surrogate ordered said administratrix to sell and assign all the interest of said contract, subject to all payments that were to become due thereon, after the granting of said order for the payment of the debts of said intestate; that, before granting such order, no bond was given, such as is required by the statutes, on ordering the mortgaging, leasing or selling of real estate of deceased persons for payment of their debts; that on the 9th of August, 1854, such bond was executed and acknowledged, and marked by the surrogate thus: "Approved Aug. 9th, as of February 6th, 1854; that by virtue of said order of sale, said administratrix, on the 30th of September, 1854, sold said contract to Jonathan Goodwin for \$250; that on the 9th of October, 1854, said sale was confirmed by an order of said surrogate; that neither on the proceedings for such sale, nor at any time, was any other bond than the two mentioned made or executed, or filed with said surrogate.

Third. That on the 20th day of September, 1852, \$200 of principal, with interest, being due and unpaid on said contract, the said Bristol declared said contract void, and commenced an action of ejectment in the supreme court, for the recovery of the possession of said lot, against the said Denis Nelin and Mary Nelin his wife, the parties in possession of said lot; that such proceedings were had in such action that afterwards, on the 30th day of October, 1852, judgment was duly rendered in said action in favor of the plaintiff therein for the possession of said premises and for \$13.35 costs.

Fourth. That on the 15th day of June, 1853, the said Bristol sold and conveyed the said lot to the said defendant, Mary Nelin.

And as matter of law, the court did find and decide that the proofs did not sustain the action. Whereupon the complaint was dismissed and judgment rendered for the defendant, and on appeal the same was affirmed; and the plaintiff now appeals to this court.

Upon the trial, the defendant produced the judgment roll

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in the action of ejectment, in favor of Bristol, against said Denis and Mary Nelin, and the plaintiff objected that this constituted no defense; but the court held that it did, unless obviated by showing that it was fraudulent, to which the plaintiff excepted. Plaintiff offered to show the declaration of the defendant, to the effect that she had paid to Bristol the whole amount due upon the contract, and had received a deed from Bristol for the said premises; and also offered to show the assignment of demands to Goodwin against Francis Hunt, by his administratrix, and offered to prove the execution of a conveyance by said administratrix, dated October 9th, 1854, to said Goodwin, of all the interest of said Francis Hunt in said real estate, and in all contracts for the purchase thereof. All of which was excluded, and the plaintiff excepted. The plaintiff also excepted to the decision of the court dismissing the complaint.

WM. TIFFANY, *for appellant.*

D. H. MARSH, *for respondent.*

DAVIES, Ch. J. These exceptions present the only question for the consideration of this court. Upon the facts found by the court, it is very clear that the plaintiff had no standing in court to impeach the title of the defendant, Mary Nelin, to the lot in question. He certainly had no greater rights than were possessed by his grantor, the administratrix of Francis Hunt. If it be true, as found by the court, that the contract, by its terms, had terminated, and Bristol had the right to declare it forfeited and terminated, as it is found he did, and proceeded to enforce his rights upon that basis, and did recover the possession of said premises, it is not seen why he had not a perfect right to sell the said premises to whomsoever he pleased, and why the defendant could not purchase the same and acquire a perfect title thereto. Upon these facts, no title or interest remained in the estate of Francis Hunt, at the time of the initiation of the proceed

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ings in the surrogate's court, to sell his real estate or his interest in the said contract of purchase. By the terms of the contract, that interest had terminated on the 20th day of September, 1852; and on that day Bristol, by the act of commencement of the action of ejectment, elected so to regard it, and on the 30th day of October succeeding obtained judgment in said action, and was therefore entitled to the possession of said premises. It is not pretended that said recovery was fraudulent or collusive.

On the 15th of June, 1853, Bristol, then the owner of said premises, sold and conveyed the same to the defendant, Mary Nelin, for a valuable consideration; and this action is on the notice of an ejectment to recover such possession. It cannot be maintained, for the very obvious reason that the plaintiff has shown no title to the premises claimed. He cannot recover upon the weakness of the defendant's title, but upon the strength of his own. The title of the plaintiff was acquired more than a year after the defendant had received a deed for the premises in dispute from the conceded true owner thereof, and when she was in possession of said premises and holding the same adversely to any title the plaintiff had or could have from the representatives of Francis Hunt. If he had survived, he could not have set up any title to said premises until he had performed, or offered to perform, said contract on his part. This neither the plaintiff nor those from whom he derived title had ever done. If they had any right, or had acquired any under such contract, it could not be asserted or enforced, unless it was made to appear that they, or those under whom they claim, had performed the same, or had offered to perform on their part. They were clearly not entitled to a deed from Bristol until this was done. And as the court had found as a fact that the money due upon this contract was never paid to Bristol or tendered to him or any one else, it is very apparent that the plaintiff, or those under whom he claims, never had or were entitled to have a title to said premises.

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If we assume that the defendant succeeded to all the duties and responsibilities imposed by the contract upon Bristol, and that the plaintiff has possessed himself of all the rights of Hunt under the contract, how then stands the plaintiff's right to maintain this action? It cannot be contended, as has been already observed, that he has any greater or other rights under the contract than Hunt would have had, if living. Before he or his assignor could have obtained title to the premises in question, by virtue of this contract, it was a prerequisite on his part that there should have been performance by him, or an offer to perform, and payment of the amount due, or tender of such payment. None of these things were done; and the court has found the fact that the moneys due upon the contract were never paid or tendered to Bristol, or to any one else. This latter branch of the finding is sufficiently comprehensive to include the defendant. We thus see that the plaintiff, and those under whom he claims, never had the title to said premises, and never were entitled, either legally or equitably, to such title. It follows, from these views, that the court properly dismissed the complaint and gave judgment for the defendant, and that the exception to such decision is untenable. It is unnecessary, in this aspect of the case, to consider the exception taken to the admission and rejection of the testimony offered. The exclusion of that offered, and the admission of that objected to, would not have improved the plaintiff's case, and therefore these rulings worked no injury to him. Without intimating any doubt as to the correctness of the rulings made, it is only needful to add that the decision of the case does not call for any expression of opinion in regard to them.

The judgment appealed from should be affirmed, with costs.

All concur.

Affirmed.

Mayor, &c., of New York, agt. Ryan.

COURT OF APPEALS.

THE MAYOR, ALDERMEN and COMMONALTY of the city of New YORK, appellants agt. **MICHAEL RYAN** and others, respondents.

Where an act is passed by the legislature, after the execution by a constable in the city of New York and his sureties of an official bond, which enlarges the jurisdiction of the district courts in said city and imposes new duties upon the constables, neither the sureties nor the bond are affected by such act.

September Term, 1867.

THE defendant Ryan was sued in the New York common pleas, as the surety of one Libberus, a constable of the city of New York. It is provided by the laws relating to that city (2 *Rev. Laws*, 397, § 147), that every person thereafter to be elected or appointed to the office of constable or marshal, in said city, should, before he entered upon the execution of said office, enter into a bond, with one or more surety or sureties, in the penal sum of \$500, jointly and severally to answer to the said mayor, &c., and the parties, if any shall complain, and conditioned that such officer shall in all things perform and execute the duties of said office.

The complaint alleged that Ryan gave the bond referred to on the 14th day of January, 1857, and that on the 8th day of May, in the said year, the defendant Libberus, as constable, received two executions against the persons therein named; that by virtue thereof he took and carried away, on the 9th of May, 1857, the property of one John Rodman, Jr., and detained the same; that Rodman brought an action against him therefor, and recovered judgment for the value of said goods, &c., to the amount of \$83.25; that an execution had been issued on said judgment, and had been duly returned unsatisfied.

On the 13th day of April, 1857, an act was passed to reduce the several acts relating to the district courts in the

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city of New York, into one act, and by this act additional duties were imposed upon the constables of said city.

J. S. CARPENTIER, *for appellants.*

E. T. RICE, *for respondents.*

DAVIES, Ch. J. It is not claimed that the duties theretofore incumbent on such officers have been changed, but only that additional or new duties have been imposed. Neither is it claimed that the acts for which the constable has been made liable in the present case, by the judgment recovered against him, were done in pursuance of any authority conferred by the act of April 13, 1857.

It is quite clear that they were personal, and discharged under and by virtue of the then existing provisions of law, and had no connection whatever with the act of April 13, 1857.

The judge at special term held that, after the bond in suit was given, the legislature, by the act of April 13, 1857, had enlarged the jurisdiction of the district courts and imposed new duties upon constables, and that when a surety enters into a bond for the faithful performance by his principal of the duties of an office, and after the giving of the bond the duties of the office are altered so as to increase or vary the risk of the surety, the bond cannot be enforced against the surety, although the act relied upon as a breach of the condition would have been a violation of the officer's duty before the alteration was made.

This judgment was affirmed at the general term of the New York common pleas, and the plaintiffs appeal to this court.

The precise point raised by this appeal has lately been under consideration by this court, and been decided.

In the case of *The People agt. Alden Vilas and others*, decided at the last March term, we held precisely the opposite doctrine.

Mygatt agt. Willcox.

In that case the defendants became the sureties, on the 15th day of January, 1850, of one Mahlon P. Jackson, as commissioner for loaning certain moneys of the United States for the county of St. Lawrence.

On the 10th of April, 1850, the legislature imposed new obligations on the principal in the discharge of the duties of his office, and it was insisted that the sureties were consequently discharged.

This court thought otherwise, and held that the sureties were not discharged.

That case is decisive of the one now under consideration, and it is unnecessary to again discuss the question or again refer to the authorities which, we believe, fully sustain the result at which we then arrived.

The judgment appealed from must be reversed and a new trial ordered, costs to abide the event.

All concur except PORTER and BOCKES, Judges, not voting.
Reversed.



SUPREME COURT.

MYGATT agt. WILLCOX and WILLCOX.

In cases in which more than *two days* are necessarily occupied in completing the trial, before the court, referee or jury, *including the preparation and submission of written points or arguments*, if that way of submission is agreed upon, the party succeeding is entitled to the additional \$10 costs, under subdivision 4 of section 307 of the Code.

Chenango Special Term, July, 1868.

MOTION by plaintiff for re-adjustment of costs.

The action was tried before a referee, whose report was for the plaintiff. On the adjustment of the plaintiff's costs before the clerk of Chenango county, the plaintiff insisted that he was entitled to the following items:

 Mygatt agt. Willcox.

For trial of an issue of fact. \$30
 Trial necessarily occupying more than two days in addition thereto. 10

The defendants claimed that the item of \$10 for the trial necessarily occupying more than two days, should be disallowed. It appeared by affidavits before the clerk, that the parties were engaged two full days in taking the evidence before the referee, and that on the evening of the second day the evidence was closed, when the plaintiff's counsel proposed to sum up the case and finish the trial, and the defendant's counsel preferred to submit on written points or arguments, when it was agreed before the referee, that the plaintiff submit his points or arguments, which was then done. It was further agreed, that the defendants have time to answer thereto in writing; and that the plaintiff have time to reply to the defendants' points or arguments. The points or arguments of the defendants were submitted to the referee by the defendants' counsel, to which the plaintiff's counsel made reply in writing.

The plaintiff's counsel was *necessarily occupied* two days thereafter in preparing said reply to the defendants' points or arguments, in addition to the two days occupied in taking testimony before the referee. The clerk disallowed said \$10.

The plaintiff excepted to the clerk's ruling and now made this motion by way of appeal for a re-adjustment.

HENRY R. MYGATT, *for plaintiff.*

I. Under section 307. subdivision 4, as amended April 27th, 1866, the trial of an issue of fact, is \$30, "and where the trial shall necessarily occupy more than two "days, ten dollars in addition thereto."

II. "A trial is the examination of the issues between the parties." (*Code*, § 252.) It includes not only the examination of the witnesses, but the application of the facts and law to the case by the respective counsel. This trial was not completed until the submission to the referee. The examination of the witnesses occupied two days, the written argument thereafter occupied two days more. It was not the less a trial by reason of the written argument.

ISAAC S. NEWTON *and* DAVID L. FOLLETT, *for the defendants.*

National Bank of Commonwealth agt. Grocers' National Bank.

MURRAY, JR., J. The opening of the cause, introduction of evidence, and summing up by counsel to the jury, or submitting of the cause to the court or referee on written points and arguments, after the evidence is closed, are parts of the trial of an issue of fact.

Such trial is not completed until finally submitted to the court, referee or jury.

In cases in which more than two days are necessarily occupied in completing the trial, including the preparation and submission of written points or arguments, if that way of submission is agreed upon, the party succeeding is entitled to the additional \$10, under subdivision 4 of section 307 of the Code.

In this case it being conceded, that more than two days was necessarily occupied in the trial, if the preparation and submission of written points or arguments are to be included as a part of the trial, there should be a re-adjustment of the costs in this action, and the clerk of Chenango county should allow plaintiff the additional \$10 under said subdivision, formerly rejected by him.



NEW YORK COMMON PLEAS.

THE NATIONAL BANK OF THE COMMONWEALTH agt. THE
GROCERS' NATIONAL BANK.

A bank upon which a check is drawn, having paid the same, cannot recover back the money from the person to whom it was paid, although the check prove a forgery.

The loss under such circumstances should fall on the bank upon which the check was drawn. A bank should know the signature of its dealers.

The right of a party ultimately to be affected is not concluded by what transpires at the *New York clearing house*, or the entries made there, in respect to a check which passes through it. The clearing house does not pass upon the genuineness of the paper.

National Bank of Commonwealth agt. Grocers' National Bank.

Payments involuntarily made may be recovered back, if the payment was in fact improper.

General Term, November, 1867.

Present, DALY, P. J., BRADY and VAN VORST, Judges.

THIS is an appeal from a judgment rendered by the justice of the first judicial district court in the city of New York, on the 26th March, 1867, in favor of the plaintiff and respondent, against the appellant and defendant. The action was commenced before the justice by summons, with a complaint annexed. On the return day, the parties appeared before the justice, and the defendant interposed no answer to the complaint, but admitted the facts stated therein to be true. The case was submitted to the justice on the complaint, whereupon the justice rendered judgment in favor of the plaintiff for the amount for which the check purported to be drawn; from which judgment this appeal is taken to the general term of this court.

The complaint avers that in December, 1866, the plaintiff received on deposit from one of its dealers a bank check drawn upon the defendant. That the check was *passed by the plaintiff to the credit of their dealers*. That the plaintiff and defendant are both members of the New York Clearing House Association, which is formed for the purpose of adjusting the balances of accounts and settling the dealings of and between the several banks in the city of New York. That by the constitution and rules of the Clearing House Association, the checks on other banks, received by banks belonging to the association from any of its dealers, are, on the morning of the day next after their receipt, presented at the clearing house, and then all the checks so received by said banks respectively are assorted for exchange between said banks, and the amount of every check then appearing to be drawn against any bank is credited in account to the bank to which it is presented, and is charged and debited in account against the bank on which it appears to have been drawn, in

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the accounts of said clearing house, whether the same *be or be not good or valid*.

That in accordance with the above mentioned custom, the plaintiff, on or about the 13th day of December, 1866, sent the check to the clearing house, and the plaintiff was then and there credited and the defendant debited with the same. That the defendant, on the 6th of March, 1867, returned the check through the clearing house to the plaintiff, on the ground that the same was a forgery, in violation of the rules prescribed by the association and of the rights of the plaintiff; and that thereupon defendant was credited *and the plaintiff debited* with the amount of the check, on the books of the clearing house association. Whereupon plaintiff immediately brought this suit to recover the amount from the defendant.

RAYMOND & COURSEN, *for defendant and appellant.*

CONVERS & LYMAN, *for plaintiff and respondent.*

By the court, VAN VORST, J. The drawee of a check or bill of exchange is presumed to know the handwriting of the drawer and the genuineness of the signatures to the paper; and having paid the same, although it should afterwards be discovered that the name of the drawer was forged, he cannot recover back the money from the party to whom it was paid.

This was determined quite early, in *Price* agt. *Neal* (3 Burr, 1354). In that case, two forged bills were drawn upon the plaintiff. Notice of the first bill was left at the plaintiff's house on the day it became due. Plaintiff sent his servant to call on the defendant to pay it, which was done. The other bill the plaintiff accepted and paid at maturity. On discovering the forgery, plaintiff brought an action for money had and received, to recover back the amount paid. The court held that the action would not lie. Lord MANSFIELD said it was incumbent upon the plaintiff to

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be satisfied that the bill drawn upon him was the drawer's hand, before he accepted or paid it, but that it was not incumbent on the defendant to inquire into it.

If the holder was at all implicated in the forgery, the action would lie against him. (*Bank of Commerce* agt. *Union Bank*, 3 Comst. 230.) In this last case, the Bank of Commerce was allowed to recover back the amount of a forged bill which it had paid to the Union Bank, but the recovery was justified on the ground that the forgery was not in counterfeiting the *name* of the drawer, "but in altering the *body of the bill*;" there being no presumption that the *body of the bill* is in the handwriting of the drawer, or in any handwriting known to the drawee, and it is unreasonable to require of him knowledge of the handwriting of any part of the bill, except the signature of the drawer.

The case first above cited charges the loss of the drawee to his own negligence, in accepting or paying a bill which he should have known to be a forgery. The last case does not question, but in terms affirms, the principle annouced in *Price* agt. *Neal*.

The check in this case appears to have come regularly to the plaintiff, in the course of business, from its dealers, and under no circumstances to excite suspicion or make inquiries necessary. The check went to the clearing house, and was there, in an adjustment of the checks and accounts between plaintiff and defendant, in pursuance of the rules of this body, credited to plaintiff and charged to defendant. As the usage of the clearing house is not to pass upon the genuineness of the paper which passes through it, the act of debiting the defendant with the amount of the check should not charge the defendant with having adopted or accepted the check. But the check went from the clearing house to the defendant's bank, and was there received, and its being charged to it at the clearing house was acquiesced in by the defendant. It does not appear how soon the defendant ascertained the forgery, but it appears that it held on to the check for sev-

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eral months, and then, "in violation of the rules prescribed by the association and of the rights of plaintiff," returned same to the clearing house, and caused it there to be debited to the plaintiff and credited to itself. The plaintiff at once repudiated this debiting of the check to its account, and of the return of the check, by bringing this action. If the defendant can in this way, and by the instrumentality of the clearing house, and against its rules, succeed in getting back money which it had previously paid on a forged check, it may do indirectly what it cannot do directly. It is quite clear that, if the defendant had sued the plaintiff for the money as soon as the forgery was discovered, it would have failed in the action. The fact that the Bank of the Commonwealth is plaintiff, rather than defendant, cannot change the absolute rights of the parties.

The payment by the plaintiff, on the return of the check to it, was not voluntary, it was forced by the action of the clearing house. This action is equitable in its nature. The question really is upon whom the loss should fall, under the circumstances of this case. I think the defendant should bear the loss.

Judgment affirmed.

COURT OF APPEALS.

FRANCIS S. COGHLAN, respondent agt. WILLIAM B. DINSMORE,
President of the Adams Express Company, appellant.

Where several distinct propositions are ruled by a judge, and a *single exception* taken to them, it follows that, if any one of the propositions can be maintained, the exception is not well taken.

An *express company* that agrees to take a promissory note to collect, and if not paid on presentation at the proper place, to have it *protested*, but neglects to cause it to be protested, are liable for the amount of the note, where there is no sufficient evidence of a waiver of notice of non-payment, and notice of protest by the indorsers, who are discharged, and it appears that the maker is insolvent.

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September Term, 1867.

THIS action was brought to recover from the defendant the amount of a promissory note, as damages charged to have been sustained by the plaintiff, by reason of the alleged omission of the Adams Express Company to cause the said note to be presented for payment, and to be protested at New Orleans, according to contract.

On the trial the plaintiff proved that, upon the 6th of April, 1861, he was the owner of a certain promissory note, made by one G. M. Nichols, payable to the order of Saltus & Co., and indorsed by them and one Anna Saltus, for nineteen hundred and twenty-two dollars and thirty-four cents, payable ten months after date, at the office of Payne & Harrison, in New Orleans.

On that day he gave the said note to the Adams Express Company for collection, and ordered that it should be protested, if not paid. He at the same time took a receipt from the defendant, setting forth the contract. The note was subsequently brought to the plaintiff by some person in the employ of the defendant, who asked him to take the note and give a receipt for it. This the plaintiff refused to do, on the ground that it did not appear to have been protested. No certificate of protest was attached to the note.

The plaintiff afterwards called at the office of the defendant, and had some conversation with the person in charge, who said that he did not know anything about it, but promised to write and inquire why the note had not been protested. The plaintiff never heard further from the defendant upon the subject.

On this statement the plaintiff rested his case.

A motion was made for a nonsuit, which was denied.

It was proved, on behalf of the defendant, that Nichols, the maker of the note, resided at Shreveport, La., and gave the note to Saltus & Co., for the purchase of iron. That he was here in April, 1861, but did not return to his place of business, in consequence of the political troubles which pre-

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ailed at that time. He made an arrangement at this time with Saltus & Co., by which he was to pay them one thousand dollars upon this note, and they agreed to protect the note and extend the time of payment of the balance. This they failed to do. It was agreed, notwithstanding this arrangement, that the note should be protested.

JOHN H. REYNOLDS, *for appellant.*

WM. ALLEN BUTLER, *for respondent.*

FULLERTON, J. The nonsuit in this case was properly denied. When the plaintiff rested, he had proved the contract by which the defendant had received the note for collection and agreed, if it were not paid on presentation, to have the same protested, and he had further given some testimony tending to prove that this contract had not been performed.

It appeared that, when the note was returned to the plaintiff by the Adams Express Company, no certificate of protest was attached to it, and the plaintiff refused to receive it for that reason. It was not then pretended, by the person having the principal charge of the affairs of the company, that the note had been protested, and he promised the plaintiff that he would write and inquire *why it had not been done*.

The plaintiff never heard from the company, or any of its officers, after that interview.

Upon this evidence, the jury could properly have found that the note had not been protested, in compliance with the defendant's contract, and it would not have been proper to have taken the case from them.

After the close of the testimony, the court ruled:

1. That the evidence on the part of the defendant did not amount to proof of waiver of notice of non-payment, and notice of protest by Saltus & Co., the indorsers of said note.

2. That such evidence was not sufficient, as between the

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plaintiff and the defendant, to discharge the express company from the performance of their agreement.

3. That there was no sufficient evidence to go to the jury of any waiver of notice of non-payment, or notice of protest, on the part of Anna Saltus, one of the indorsers of the note.

To these three distinct propositions the defendant took a single exception, and it follows that, if any one of the propositions can be maintained, the exception is not well taken. (*Day* agt. *Roth*, 18 N. Y. R. 448; *Winchell* agt. *Hicks*, *Id.* 558; *Haggart* agt. *Morgan*, 5 N. Y. R. 422; *Hunt* agt. *Maybee*, 7 *Id.* 266.) The last of the three propositions was undisputedly correct. There is no evidence whatever in the case tending to show that Anna Saltus ever waived her rights as indorser of the note.

Whatever may have transpired between the maker and the other indorsers, affecting the rights of the latter, it is not pretended that Mrs. Saltus ever participated in or had any knowledge of it. She was therefore entirely unaffected by the agreement by which it is claimed the other indorsers waived notice of protest. Consequently, the judge ruled correctly as to that part of the case, and the exception does not bring the other propositions under consideration.

Neither was there error in the refusal to charge that the plaintiff could not recover, unless the jury should believe that the maker of the note was insolvent.

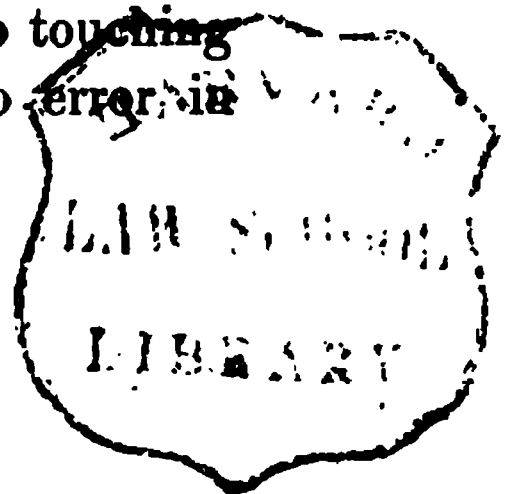
The evidence touching the maker's pecuniary condition was given by himself, and he frankly confessed that he had no means to pay his debts at that time, nor had he been able to pay this note in money at any time since its maturity.

The particulars he gave of his condition, all went to show that he was insolvent.

There was no dispute about these facts sworn to touching his liability to pay his debts, and there was no error in refusing to submit the question to the jury.

The judgment should be affirmed, with costs.

All concur. Affirmed.



Matter of Union Village and Johnsonville Railroad Co.

SUPREME COURT.

In the Matter of the Application of the UNION VILLAGE AND JOHNSONVILLE RAILROAD COMPANY to take lands of NATHAN G. AKIN.

In appraising lands to be taken for a railroad, under the statute, the commissioners are not authorized to increase the amount of compensation which they have fixed as the full value of the land, by allowing consequential damages, based upon the possibility, or even probability, that the particular business in which the owner was engaged might be injured, and his property (a flax mill) decrease in value, in consequence of danger to be apprehended from fire emitted from the engines used by the company in running their road.

Albany General Term, March, 1868.

Before INGALLS, HOGEBOM and PECKHAM, Justices.

THIS is an appeal by Nathan G. Akin from the order of the special term, confirming the report of commissioners awarding to him damages for land taken by the railroad company for the purpose of laying its track.

I. G. THOMPSON and M. I. TOWNSEND, *for appellant.*

D. A. BOIES, *for respondent.*

By the court, INGALLS, J. About four acres of the appellant's land was taken, and the commissioners awarded him \$1,500. The only question raised upon this appeal is, whether the commissioners should have increased the above amount by allowing consequential damages, based upon the possibility, or even probability, that the particular business in which Akin was engaged might be injured, and his property decreased in value, in consequence of danger to be apprehended from fire emitted from engines used by the company in running their road. It is quite obvious that the commissioners, in their estimate, have considerably exceeded the actual value of the land for purely agricultural purposes, as their allowance amounts to about \$400 per acre. The statute which prescribes the course to be pursued by com-

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missioners, in assessing damages, is as follows: "Ascertain and determine the compensation which ought justly to be made by the company to the owners or persons interested in the real estate appraised by them; and in fixing the amount of such compensation, such commissioners shall not make any allowance or determination on account of any real or supposed benefit which the parties in interest may derive from the construction of the proposed railroad, or the proposed improvement connected with such road, for which such real estate may be taken." (*Rev. Stat. 5th ed. vol. 2, p. 674, § 16.*)

After a careful examination of the authorities cited by the counsel for the respective parties, we are of opinion that the commissioners committed no error in their determination, by excluding such consequential damages, and the following cases sustain their assessment: *Albany Northern Railroad Co. agt. Lansing*, 16 *Barb.* 68; *Canandaigua and N. Railroad Co. agt. Payne*, *Id.* 273; *Troy and Boston Railroad Co. agt. Lee*, 13 *Barb.* 169. These decisions have been too long acquiesced in, as sound expositions of the law upon this question, to be disturbed without very substantial reason therefor. And we conclude that the case at bar does not present features which should induce this court to interfere with the principle settled by the cases above referred to, or which distinguish this case from those cited. No rule, however wise and just in its general application, is without exceptions, wherein it operates harshly, and possibly the case at bar furnishes an illustration. It is quite obvious that the legislature intended that the advantages which would be produced by the establishment of a railroad should compensate, to some extent at least, for the disadvantages consequent thereupon; for it is expressly provided that such advantages shall not be taken into account to reduce the damages to which the owner of the land is entitled.

The appellant has upon his land a *flax mill*, which he claims will be endangered by fire, and thereby rendered less

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valuable. Now, in order to determine the damages which Akin would be likely to suffer in consequence of an interference with such business, it would involve the inquiry whether or not that particular business was likely to be permanent and profitable, which at best could only be conjectural and unsatisfactory, and furnish no reliable basis for an appraisal of damages. It is clear that the legislature could not have intended that any such uncertain criterion should be adopted. It is not certain that the appellant's buildings would be set on fire by the running of the engines of the company, and if not, then no damages would accrue to appellant. But if fire was occasioned thereby, through the negligence of the company, it would be liable to respond in damages.

We are therefore of opinion that the commissioners adopted the proper rule in determining the compensation to which the appellant was entitled, and that the order of the special term should be affirmed, with costs.

COURT OF APPEALS.

JOHN RADWAY and others, appellants agt. JEREMIAH BRIGGS
and NATHANIEL BRIGGS, respondents.

The lessees of the *wharfage* of a public pier from the corporation of the city of New York, where in the lease is assigned the *wharfage* which shall or may arise or accrue during the time covered by the lease, the lessees agreeing to keep the premises in repair, are liable for an injury arising during the lease, by which a horse is backed off the pier and drowned, in consequence of neglect to keep the string pieces thereon in proper repair.

It was error for the court below to *nonsuit* the plaintiffs, on the ground that they had not shown that the defendants (the lessees) were *in possession*, under their lease, of the premises in question, at the time of the injury.

The naked right to collect wharfage, which was all that the defendants possessed in this case, is incorporeal in its nature, and is incapable of any other or different possession than grows out of the right itself, and is incident thereto, and which attached by force of the agreement which originated it immediately on its execution and delivery.

The defendants were not entitled to the exclusive physical possession of the pier

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by the terms of their lease; neither was it in the power of the corporation to grant it to them. A public pier is a part of the public highway, and must be devoted to the public use.

September Term, 1867.

APPEAL from the common pleas in the city of New York.

The plaintiffs brought their action to recover the value of a horse and cart and a load of merchandise. On the trial they proved that, in March, 1858, their carman drove upon one of the public piers, in the city of New York, with a load of merchandise, to deliver it on board of a steamer lying there. That whilst there the horse became unmanageable, backed into the river, and was drowned. They also proved that the string piece on the westerly side of the pier (the side on which the horse backed off) was in an unsafe condition, being not more than *two inches* above the surface of the pier.

They further proved a lease from the corporation of the city of New York to the defendants, bearing date March 4th, 1855, which first recited that the corporation was the owner of several wharves, slips, piers or bulkheads in said city, and entitled to collect and receive the wharfage and slippage thereof, and had agreed to sell and assign their right to the collection of wharfage at some of them to the defendants for the term of five years from the 1st day of May then ensuing. This instrument then proceeded to convey to the defendants, "their heirs and assigns, all and singular the wharfage which shall or may arise, accrue or become due between May 1st, 1855, and May 1st, 1860, for the use or occupation, by vessels of more than five tons burden, of any of the wharves, slips, piers or bulkheads belonging to said parties of the first part, in the East river, or of, in or to which they are entitled, to receive and collect the wharfage and slippage thereof, at the west side of Pier No. 12, and the bulkhead adjoining the foot of Old Slip, excepting all such docks, wharves, piers and slips as are otherwise leased by said parties of the first part, or used for ferry purposes." The defendants covenanted

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"during the continuance of said lease, to keep the said wharves, piers or bulkheads in good repair, at their own proper cost and charge, and surrender the same at the expiration of said term, in as good condition as they are at the time they take possession thereof, the natural wear and decay excepted."

They also covenanted that, during the same period, they would "keep the wharves in good condition and safe and proper repair, *including especially the string pieces*, and other superficial portions thereof, *for safe usage*," &c., &c.

They also covenanted that they would, "on the last day of the term demised, or other sooner determination thereof, surrender and yield up the said rights and privileges hereby demised, with all and singular the rights, members, privileges and appurtenances thereto belonging into the hands and possession of the parties of the first part, without fraud or delay." The defendants agreed further, on their part, that no demand should be made nor any compensation received for the occupation of the top or surface of any of the public wharves or piers, for any purpose whatever.

At the close of the plaintiffs' evidence, the defendants' counsel moved to dismiss the complaint, on the ground that the plaintiffs had not shown that the defendants were in possession of the premises in question at the time of the occurrence; and the court granted the motion.

The general term affirmed the judgment, and the plaintiffs appealed to this court.

CHARLES N. BLACK, *for appellants*.

BENEDICT, BURR & BENEDICT, *for respondents*.

FULLERTON, J. It was not necessary for the plaintiffs to prove that the defendants were in the actual possession of the pier, to entitle them to recover in this case.

They were not entitled to the exclusive possession, by the

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terms of their lease; neither was it in the power of the corporation to grant it to them.

A public pier is a part of the public highway, and must be devoted to the public use. The exclusive use of a public pier may be granted by the common council of the city of New York, to vessels engaged in commerce, or for commercial purposes (*Davies' Laws*, 705), but not to individuals, for private purposes, to the exclusion of the public. It has been suggested, too, that this must be done by the city, in its legislative capacity, and not by mere contract through its officers. (*The Mayor agt. Rice*, 4 *E. D. Smith*, 609.) By various statutes of this state, authority is given to the owners of private wharves or piers, and to the corporation, as to public piers, to collect wharfage and slippage from vessels that occupy them, the rates being fixed by law.

The accident in this case occurred on one of the public piers of the city of New York, for the use of which the city had the right to collect wharfage, being charged, of course, with the correlative duty of keeping it in repair. The legal effect of the instrument given in evidence on the trial was to subrogate the defendants to the place of the corporation, investing them with all the rights and subjecting them to all the duties of that body, as the owner of a public pier.

This will appear plain, when reference is made to the terms of the instrument. It sells and assigns the *wharfage* which shall or may arise or accrue during the time covered by the lease, the lessees agreeing to keep the premises in repair.

But it does not purport to give possession of the property; on the contrary, the lessees were required to covenant that "no demand should be made nor any compensation received for the occupation of the *top* or *surface* of such wharves or piers, for any purpose whatever."

The defendants in this case, therefore, had no other right in or to the use or possession of the property not enjoyed by every other citizen in common with them, except the right

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to collect the wharfage to which their agreement entitled them, and the right to enter for the purpose of making repairs, in compliance with their covenant.

I have not overlooked the fact that the lessees covenanted "to surrender the piers, at the expiration of the time, in as good condition as they were at the time they took possession thereof."

But these were not apt terms to express the real meaning of the parties. This language was used in connection with and is a part of the covenant to keep in repair, and was designed to express the condition which the property should be in at the expiration of the term, rather than to define the tenure by which the defendants held it.

This is rendered the more apparent when we refer to another clause, at the close of the instrument, where the lessees covenant to "surrender and yield up the *rights and privileges* demised."

The naked right to collect wharfage (which was all that the defendants possessed) is incorporeal in its nature, and is incapable of any other or different possession than grows out of the right itself, and is incidental thereto, and which attached, by force of the agreement which originated it, immediately on its execution and delivery. (*East Haven agt. Hemingway*, 7 Conn. 186, 203.)

When, therefore, the plaintiffs were nonsuited on the ground that they had not shown that the defendants were in possession of the premises under their lease, the court overlooked the distinction between the bare right to collect wharfage and the actual physical possession of the premises in connection with which the right was exercised.

If a turnpike company should sell and assign the tolls which it had a right to receive, the assignee agreeing to keep the road bed in repair, in an action against such assignee, for damages growing out of his neglect to perform his duty, it would not be pretended that it would be necessary to prove that he had entered into possession of the highway.

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It was necessary, however, to prove that the defendants accepted the grant, in order to make them liable for the plaintiffs' loss; this being quite a different thing from the question of the possession of the premises. But that acceptance was proved by the introduction of the lease; for it was signed by the defendants themselves.

Even if that had not been the case, the acceptance would have been presumed, upon the principle that a man is presumed to accept that which is a benefit. (*Camp* agt. *Camp*, 5 *Conn.* 291; *Doe* agt. *Marston*, 3 *Wend.* 149; *Bailey* agt. *Culverwell*, 8 *Bar. & Cres.* 448; *Townson* agt. *Tickell*, 3 *Bar. & Ald.* 31.)

Having accepted the grant, the defendants were bound to keep the premises in repair. The damage which the plaintiffs sustained was caused by their neglect, and they are liable for it. The city exercised due care on its part, when it required the defendants to keep the premises "in good condition and safe and proper repair, including especially the string pieces."

And this the defendants failed to do.

It was the want of a safe and proper string piece that caused the accident, and the defendants are clearly liable (*Burton* agt. *Barclay*, 5 *M. & Payne*, 785; *Mayor of Albany* agt. *Cunliff*, 2 *Com.* 165; *Henley* agt. *The Mayor of Lyme*, 3 *B. & A.* 77; *Brett* agt. *Cumberland*, *Cro. Jac.* 399, 521; 4 *Cush.* 277.)

The judgment should be reversed and a new trial ordered. All concur except HUNT and BOCKES, Judges, not voting. Reversed.

People agt. Central City Bank.

SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK agt. THE CENTRAL CITY BANK.

Where an objection is made to an *order to show cause*, that it was not made at a *regularly adjourned special term*, it will not be *presumed* that the order was made at a term *irregularly* held.

Where the court has been regularly convened, it continues open till actually adjourned; an order for its continuance is not essential; and an order made by the court that it should so continue, is not necessary to be entered with the clerk; and if it was, it could be entered *nunc pro tunc*, in order to sustain otherwise regular proceedings had under the order.

Where an *order* is properly granted by the court in an action or proceeding, the delay or omission of a clerk to make actual and speedy entry of it in the minutes of the court—as it is his duty, without any special directions to that effect—cannot be allowed to prejudice the substantial rights of parties.

An *order to show cause* issued against a *bank* is properly served upon its *vice-president*, especially where it appears that he is also a *director*, which perhaps might be presumed from his office of vice-president.

Where *two receivers*, appointed to wind up the affairs of an insolvent bank, are appointed *on the same day*, and both claiming the assets of the bank and the right to act, one of them being in actual possession, the court, on the application of the other receiver for the removal of the one in possession, and for possession, must regard it as a question of legal *priority*, and of course must take notice of the *fractures of the day* upon which such appointments were made.

The mere *preparation* and *verification* of papers for an application for the appointment of a receiver, &c., cannot determine the question of *priority*.

Where one of the two applications for the appointment of a receiver—both made on the same day, before different justices, in different judicial districts—obtained the first judicial action by *service of papers*, of the first *granting the order*, of the first perfecting of the appointment, by the *execution, approval and filing of the required bond*, it took precedence of the other, notwithstanding the latter receiver first took actual possession of the property and assets of the bank.

The provisions of the Revised Statutes (2 R. S. 461), entitled “Of proceedings against corporations, in equity,” are not repealed or abolished by chapter 226 of the laws of 1849 (*Sess. Laws 1849, p. 340*), entitled, “An act to enforce the responsibility of stockholders in certain banking corporations and associations, as prescribed by the constitution, and to provide for the prompt payment of demands against such corporations and associations.”

Therefore, under the Revised Statutes, proceedings may still be instituted by the people, through their attorney general, for the dissolution of a moneyed corporation and the appointment of a receiver to wind up its affairs. This valuable right was not intended to be in any wise impaired by the act of 1849. So far as this question is concerned, they do not necessarily conflict, and may well stand together.

Albany General Term, March, 1867.

People agt. Central City Bank.

Before PECKHAM, MILLER and HOGEBOOM, Justices.

APPEAL. by plaintiffs from order at special term, refusing attachment and other relief.

J. H. MARTINDALE, *attorney general, for plaintiffs, appellants.*

DANIEL PRATT *and* LYMAN TREMAIN, *for defendants, respondents.*

By the court, HOGEBOOM, J. The plaintiffs moved at special term, in the third district (where the venue was laid), for an order against Charles B. Sedgwick, Esq., of Syracuse, to show cause why the custody of the assets of said bank is withheld from L. Harris Hiscock, the receiver appointed therein by Justice PECKHAM, why an attachment should not issue against him the said Sedgwick, why he should not be punished for his alleged misconduct, and why the order (of Justice FOSTER) appointing him the said Sedgwick receiver should not be vacated.

The motion is made upon all the papers in the case, and it is necessary to look into most of them to determine the merits of the application. The Central City Bank suspended payment on Saturday, the 29th day of December, 1866. Upon a petition of the attorney general, accompanying papers stating that fact and the insolvency of the bank, verified on the 31st day of December, 1866, Justice PECKHAM, at special term, granted an order for the defendant to show cause on that day, at 11 o'clock A. M., why the business of said corporation should not be closed and a receiver appointed. This order, together with the summons and complaint, were personally served upon Hon. Ee Roy Morgan, the vice-president, and a director of said bank, on said 31st day of December, at about 10½ o'clock A. M. At the time appointed for showing cause, the plaintiffs appeared by counsel, and the defendant did not appear. An order was thereupon granted at special term, by Justice PECKHAM, that

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the said Central City Bank be and the same was thereby dissolved, and restraining the bank and its officers from exercising any of its corporate functions, and from receiving or disposing of any of its effects, except to the receiver, and appointing L. Harris Hiscock, on filing a proper bond, duly approved (describing same), receiver of the bank, with the usual powers in closing up the affairs of the bank and making final settlement of the same. This order was filed with the clerk at about 11:35 A. M. of the 31st of December, and on the same day, at about the same hour, the required bond, duly approved, was filed with the clerk. Mr. Hiscock, learning that Mr. Sedgwick was in possession of the assets of the bank, called upon him, on the 3d day of January, 1867, exhibiting to him the order appointing him receiver, and demanded of him possession of said assets, with which demand said Sedgwick refused to comply. Thereupon the proceedings before referred to were instituted, to compel such compliance and to punish him for contempt, which resulted in the order at special term, from which this appeal is taken.

The ground upon which said Sedgwick refused compliance with said order, and declined to deliver said assets, was that as he claimed he himself was the lawful receiver of the bank, and entitled to hold and administer its assets. On the 29th day of December, 1866 (the day on which the bank suspended payment), George Barnes, the cashier of the institution, initiated proceedings under the act of 1849, to obtain an injunction against the bank and the appointment of a receiver; that is, he employed counsel and verified a petition on that day for such purpose. Upon this petition, Justice FOSTER, on the 31st day of December, 1866, at chambers, and as early as 11 o'clock of that day, granted an order that said bank, on the same day, at 4 o'clock P. M., show cause why it should not be declared insolvent, and why an injunction should not issue and a receiver be appointed. These papers were soon thereafter duly served upon Oliver F. Burt, the president of the bank (as by said order required),

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on said 31st day of December. At the time appointed the parties appeared, and Justice FOSTER, at chambers, made an order declaring the bank insolvent, awarding an injunction against the further exercise of its functions, and appointing the said Charles B. Sedgwick receiver of the bank, on his executing and filing with the clerk a bond, with sureties, duly approved (as specified in said order). On the same day, the requisite bond, duly approved, was executed and filed with the clerk of Onondaga; and thereupon, also on the same day, said Sedgwick, as such receiver, demanded and received from Oliver F. Burt, the president, possession of the property and assets of the institution, which he still retains.

The proceedings under which the respective parties acted in obtaining the appointment of their respective receivers, considered without reference to each other or to the validity of the statute under which they were respectively had, appear to have been regular, or, at least, not invalid. Some objections, partly of a technical character, are taken by the defendant against the plaintiff's proceedings, on the question of regularity, but I think they have not a sufficient foundation to invalidate the proceedings. Thus, in regard to the orders made by Justice PECKHAM, 1st, the order to show cause, and 2d, the order appointing a receiver, it is said they are invalid, because not shown to have been made at a regularly adjourned special term, and not to have been actually entered by the clerk. As to the first objection, I think the answer is, it will not be *presumed* that they were made at a term irregularly held. There is nothing to show that the special term in question was not the continuance of a term regularly held by the justice, and held open by him for the transaction of further business, at his chambers or elsewhere. The court having been regularly convened, continues open till actually adjourned. An order for its continuance is not essential; and an order made by the court, that it should so continue, is not necessary to be entered with the clerk. If it is so, I think when actually made by the court (which is

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the act which gives it vitality), it is the duty of the clerk to enter it, or if accidentally omitted, it may be entered by him *nunc pro tunc*, and would even now, if necessary, be ordered to be entered, to sustain proceedings had under it otherwise regular. If Justice PECKHAM's special term was of this character, as we may presume, there is nothing to impeach their validity in the respect just specified. As to the second objection, that the orders were not entered by the clerk, as I have just said, they were the orders of the court, approved by the seal of the justice, and *must* be entered. If not entered immediately, as is of course more appropriate, they may be entered afterwards. It is the clerk's duty to enter them, without any special directions to that effect, and they may be entered *nunc pro tunc*, when accidentally omitted, and when necessary to sustain proceedings had in good faith, and otherwise unexceptionable. The delay or omission of a clerk to make actual and speedy entry of the order in the minutes, cannot be allowed to prejudice the substantial rights of parties.

Again, it is said that the order to show cause was not properly served, and that no proper evidence of service was furnished to the court or incorporated in the order. The order was served on the vice-president, and I think he was a proper person on whom to serve. It now appears that he was also a director, and I rather think that would be presumed from his office of vice-president. Although the evidence of such service is not recited in the order appointing the receiver, I think we may presume that the evidence of it was presented to the court before it allowed them to take an order on the non-appearance of the defendant, which was directed to be served on the defendant.

It is supposed that, as both of these receivers were appointed on the same day, and Sedgwick has possession of the assets, the court will not inquire into the fractions of a day to displace his possession. But it is a question of actual priority, which, I think, we are bound to settle, and that when par-

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ties stand upon their legal rights, in a matter in which, in themselves considered, both are unexceptionable men, if we can fairly determine the question of legal priority, the ends of justice require that it should be carried into execution.

These preliminaries disposed of, two questions remain: 1. Were the Revised Statutes in operation, so as to justify the proceedings taken by the attorney general? 2. If so, which party had the legal priority of right to the possession of the assets?

We will consider the latter question first.

Although the petition for the appointment of a receiver was first prepared and verified in the case pending before Justice FOSTER, yet the first judicial action was taken in the case pending before Justice PECKHAM, both, however, being on the same day. The precise hour does not appear, further than that Judge PECKHAM's order was served about half an hour before Judge FOSTER's order was granted. All the subsequent judicial proceedings necessary to perfect the appointment of a receiver, had before Justice PECKHAM, preceded those before Justice FOSTER. Justice PECKHAM's order to show cause was returnable at 11 A. M., and his order for the appointment of a receiver, as granted, was filed with the clerk about 11:35 A. M., together with the bond of the receiver, duly executed and approved. Justice FOSTER's order to show cause was not returnable till 4 o'clock P. M., and it was at or after that hour that it was made, the bond filed, and the appointment of Mr. Sedgwick perfected. On the *same* day Sedgwick obtained possession of the assets. The mere preparation and verification of the papers cannot determine the question of priority; and whether it be determined by the question of first judicial action, of first service of papers, of the first granting of the order for the appointment of the receiver, or the first perfecting of the appointment, by the execution, approval and filing of the required bond, the proceedings had before Justice PECKHAM take precedence. One of these latter questions must, I think, deter-

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mine it; for the mere fact that Sedgwick first obtained the actual possession of the assets cannot settle the question of legal right.

The defendants claim that the provisions of the Revised Statutes, entitled "Of proceedings against corporations, in equity" (2 R. S. 464, 465), under which the plaintiffs evidently proceeded in this case, are abolished by chapter 226 of the laws of 1849 (*page* 340), under which the proceedings were instituted which resulted in the appointment of Mr. Sedgwick. There is no express repeal; and if there be any repeal, it must be a repeal by implication, resulting from the inconsistency of the two statutes, or from the evident intent of the legislature to substitute the latter proceedings in the place of the former. The first four sections relate to the liability of stockholders, and have no connection with this subject. Sections 5 and 6 provide for the speedy enforcement of claims against the bank by suit, judgment and execution, and on the return of an execution unsatisfied, for an order declaring the insolvency of the corporation. Sections 7, 8 and 9 provide for an application for an order of the same kind by a creditor having a demand exceeding \$100, after the lapse of ten days after demand of payment of such claim and refusal to pay, and for a temporary injunction, and also ultimately, after a hearing, for an injunction restraining the exercise of its corporate rights, and for a receiver. Section 10 (under which the defendant's proceedings were taken) provides for an application for an order declaring the corporation insolvent, or in imminent danger of insolvency, by any one or more stockholders, to the amount of one-tenth of the capital of the bank, and also for a temporary and final injunction and a *receiver*, as specified in section 9. Section 12 defines the powers and duties of the receiver, and all the subsequent sections of the act appear only to contain provisions for the speedy and effectual execution of his trust, and for the prevention of delays in the enforcement of demands against corporations.

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This act, it is plain, does not cover a large number of cases in which courts of equity have exercised jurisdiction over corporations, many of which are recited in the title of the Revised Statutes heretofore quoted, and among others, several of the cases specified in sections 39, 40, 41, of that title (2 R. S. 464), by which, in the event of the insolvency of a corporation, its violation of any of the provisions of its act of incorporation, or of any other act binding on such corporation, a court of equity may, *upon the application of the attorney general in behalf of the state*, issue an injunction restraining the corporation from the exercise of its corporate powers, and from the collection of its debts, and from the disposition of its property, and may also, *in any stage of the proceedings, appoint one or more receivers* to take charge of the property and effects of such corporation.

I think it could not have been intended by the act of 1849 to repeal these provisions of the Revised Statutes, so far as respects the people of the state. The act of 1849 does not provide for them, otherwise than as they might happen to be *creditors* of the corporation. It is emphatically the right of the people, in their sovereign capacity, to enforce strict observance of the obligations imposed by law and by their charters, not the least important of which is the obligation to pay their debts on demand, and on default of such observance to institute proceedings through their attorney general for the dissolution of the corporation and the appointment of a receiver to wind up its affairs. I cannot believe this valuable right was intended to be in any wise impaired by the act of 1849. So far as this question is concerned, they do not necessarily conflict, and may well stand together. The convention of judges of the first and second districts, which met in October, 1857, under peculiar circumstances, and under the pressure of a very just and laudable desire to sustain the banks in the pecuniary crisis of that period, pronounced no opinion inconsistent with the maintenance of this action. They say: "In all cases in which the act of

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1849 is applicable, it is deemed to supersede the provisions of the Revised Statutes." (*Livingston agt. The Bank of New York*, 5 Abb. 343.) The language is guarded, and I think leaves the Revised Statutes to operate in a case like the present. Nor does Justice ALLEN, in the case of *Ferry agt. The Bank of Central New York* (15 How. 450), decide the question adversely to the views now presented. On the contrary, he says, "I am aware that the policy of the law does not favor the repeal of statutes by implication, and that ordinarily there must be a clear repugnance between the two statutes before the latter will be held to operate as a repeal of the former, in the absence of a repeal in terms, and that courts hold against the repeal when both can stand together. *These two statutes cannot be said to be so repugnant to each other that they cannot in many things stand together.*" * *

"The question is one of too much importance to be hastily decided at special term, unless necessary to the determination of a pending matter; and as I do not deem it essential to pass upon it upon this motion, I will not further consider it." It will be noted that the case of *Ferry* was the case of a *stockholder* of the bank, and was not therefore like the present case.

As the result of these considerations, I think that the order of the special term, which continues the injunction, should be *reversed*.

Something is said in the papers about the comparative fitness of these two persons for the office of receiver, their comparative leisure for that purpose, and the comparative extent in which they represent the wishes of a majority of the stockholders. But I discover no reason for any just criticism upon either of them as to their personal fitness or business capacity. If any objection really exists on that score, there can be no reason why an application for his removal, and having that object directly in view, may not be hereafter made.

It is further said that it is inadmissible in this collateral

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way to attack the proceedings before Justice FOSTER. We do not propose to take any jurisdiction of those proceedings; but, pending before us, in an application originating in this district, a question as to the validity of the appointment of a receiver, and as to the priority of his title to the assets of the bank, compared with that of a receiver appointed elsewhere, we cannot decline to decide the question necessarily involved. Nor should Mr. Sedgwick be punished for contumacy, or for a disobedience of the order of the court. He appears to have acted in good faith, and had the authority of an order of the court, which he was probably entitled to regard as valid until pronounced otherwise, on the question of priority, by a competent tribunal. That decision being now pronounced, it will be his duty to obey it and deliver over the assets to Mr. Hiscock, the receiver first appointed. I see no other course to pursue. These receivers cannot with propriety both act. They are appointed under distinct and independent proceedings, and by the terms of their appointment each has entire control of all the assets of the bank. The title of the one is necessarily exclusive of that of the other, and the question of priority must be determined as a legal right.

I think the proper order to be entered is, that the order of the special term be reversed; that L. Harris Hiscock be declared the lawful receiver of the property and assets of the Central City Bank, and entitled to their custody and possession; that Charles B. Sedgwick, Esq., deliver over the same on demand to said Hiscock, so far as they are in the possession or under the control of said Sedgwick, and that in the event of his neglect or refusal to do so, said Hiscock have leave to apply at special term for the proper enforcement of this order.

MILLER, J., concurred.

PECKHAM, J., expressed no opinion.

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SUPREME COURT.

RICHARD SCHELL agt. THE ERIE RAILWAY COMPANY and others.

The supreme court has no power to grant an *injunction order* in one action, staying proceedings in another action pending in the same court; nor in another court having full jurisdiction over the subject matter.

New York General Term, April, 1868.

Before INGRAHAM, CARDOZO and BARNARD, *Justices.*

THIS appeal is taken from an order made the 19th of March, 1868, by Justice BARNARD, appointing a receiver.

The action was commenced originally against some of the defendants; afterwards, on the 14th of March, 1868, an order to show cause was granted, returnable forthwith, why a supplemental complaint should not be filed, and why a receiver should not be appointed of the proceeds of fifty thousand shares of stock, &c. These papers were served on Mr. Skidmore, one of the defendants, and a director of the Erie Railway Company, in court, and the motion was immediately brought on, and no one appearing to oppose, was granted, and a receiver was appointed.

Previous to the hearing of this motion, a suit had been commenced in another district, upon which an injunction was obtained restraining among others, this plaintiff from proceeding with his action, and from obtaining any appointment of a receiver therein. This injunction was served on Schell on the 18th of March, as appears by the affidavit.

On the 16th of March, 1868, an order was made by Mr. Justice BARNARD, founded on the order of Mr. Justice CLERKE, requiring the Erie Railway Company to show cause on the 19th of March, before him, why the appointment of the 14th of March should not then be perfected, and a further order made as to the receiver, and why the order of Justice CLERKE

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should not be vacated. Upon the return of this order, the order of 19th of March was made deciding that the order of Justice CLERKE should not be held to stay the plaintiffs' proceedings; that the motion to vacate the appointment of a receiver be denied, and that the stay of proceedings in the order of Justice CLERKE should be vacated. He also gave the plaintiff leave to file a supplemental complaint; ordered the appointment of a receiver, and made other provisions as to security and accounting. From this order defendants appealed to the general term.

JOHN E. BURRELL, D. D. FIELD, JAMES T. BRADY, *for appellants.*

CHARLES A. RAPALLO, CHARLES O'CONOR, *for respondents.*

INGRAHAM, J. The view I entertain of the proceedings in this case renders an examination of the merits unnecessary on this appeal.

The first order of the 14th March does not appear to be relied on for sustaining the appointment of the receiver. It was made in court on an order issued there and served on a director in court, who was at that time in the custody of the sheriff, and who could not therefore have the opportunity to confer with the officers of the company, or prepare the necessary papers, or adopt any measures to show cause against the application. Such a service cannot be considered a proper service upon the company. When the law provides for serving papers on any officer of a company, it must intend that a reasonable time shall be allowed such officer to place the papers in the possession of those whose duty it is to protect the company from the measures intended to be taken against it. Without such time it is evident that any company may be deprived of its rights and property.

I do not mean to deny that a judge may not in a proper case

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make an order returnable before him forthwith, when the parties are before him and can be then served, but under ordinary circumstances such a course of proceeding is not desirable.

This order, however, was not relied on, and the order of the 16th March appears to have been made for the purpose of perfecting the appointment of the receiver then made. On the return to this order, the order appealed from was made. No objection is made to want of notice on this last motion, and the only difficulty in the way of sustaining it is the order of Mr. Justice CLERKE in the case of the *Erie Company and Whitney agt. Vanderbilt and others*.

This order stayed the plaintiffs' proceedings, and if not properly vacated all such proceedings were irregular and should be set aside. The order of Justice BARNARD to show cause why the stay of proceedings should not be vacated, would have been sufficient to justify him in vacating such stay if the action had been in this district, but there is nothing in that order which warranted the portion of the order of the 19th March, which denied the motion founded on the order to show cause granted by Mr. Justice CLERKE. No such object was contemplated by the order to show cause of 16th March, but a mere modification of the stay of proceedings therein contained.

The great difficulty, however, lies in the fact that the action in which that injunction was granted was brought in the seventh district. In all actions triable in any other district than the first, the judges of this district have no authority to hear motions within the first district. The four hundred and first section of the Code, subdivision four, provides that "motions upon notice must be made within the district in which the action is triable, or in a county adjoining; and no motion upon notice can be made in the first judicial district in an action triable elsewhere." This section forbids the hearing of any such motion in this district in an action

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pending in the seventh district, and would make the decision on that order a nullity.

Two grounds are relied on to take this out of the above provision. One is, that the order of Justice CLERKE, staying the plaintiffs' proceeding, may be disregarded by the court when the case was before them, and the other that such an order staying proceedings in another action pending in the same court is irregular and without any force. I think neither ground is sufficient. The court may disregard such an order if, on hearing a cause, it should see fit to do so, although, as between judges of the same court, such a course of proceeding is not desirable. But the party to the suit is enjoined, and not the court. Such party has no right to apply for any order while the injunction is in force, except to vacate it, and the power to vacate it did not rest with a judge in the first district. He still remains subject to its restraint, and any application by him in violation of it makes his proceeding irregular. Such injunction acts not upon the court but on the party. (*New York and New Haven Railroad Company agt. Schuyler*, 17 How. Pr. R., p. 464.)

Even if erroneously granted the injunction should be obeyed until vacated. (*People agt. Sturtevant*, 5 Selden 263; *Moat agt. Holbein*, 2 Edw. 188; *Peck agt. York*, 32 How. Pr. R. 408.) It is also suggested that it was irregular in Judge CLERKE to stay proceedings in another action in the same court. Whether it be so or not, is not necessary for me to decide. The experience in this litigation shows that it does not tend to a due administration of justice. There would have been no difficulty at first for the defendants to do as they did on this motion now under consideration, to have appealed from the first order that was made, and obtained a stay in the meanwhile. Such a course would have protected all the parties, and avoided much of the confusion which has arisen from conflicting orders obtained from different judges in the same court.

This order having been made while the injunction was in

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full force in the action brought by Whitney, and that injunction still remaining in force, made the act of the plaintiff in this suit, in applying for a receiver, irregular, and the order should on that account be reversed.

By the court, CARDOZO, J. The opinion of Mr. Justice INGRAHAM concedes that "the only difficulty in the way of sustaining" the order made by Mr. Justice BARNARD, on the 19th of March, "is the order of Mr. Justice CLERKE, in the case of *The Erie Railway Company and Whitney agt. Vanderbilt, &c.*;" and therefore, although I have considered the whole case, it will only be necessary for me to express my views upon this one matter, to show that, in my judgment, the order appealed from should be affirmed.

I am of opinion that the order of Judge CLERKE was absolutely void, and, consequently, that anybody might lawfully disregard it.

The plaintiff in this case brought his action in this court against the Erie Railway Company and others, and obtained an injunction from Mr. Justice BARNARD, in this district. After various proceedings in the action, the Erie Railway Company and Whitney bring a suit against Mr. Schell and others, laying the venue in Steuben county, and obtained from Mr. Justice CLERKE, of this district, an injunction stopping the cause of the plaintiff, restraining the clerk of the court from entering an order made by one of the judges, and not only forbidding the prosecution of this and other suits by this plaintiff and others named, but directing that any other person who might *thereafter* bring an action of the like nature, or intended to accomplish the object sought to be obtained by this suit should, upon notice of that order of injunction, desist and refrain from further prosecuting the same. An injunction which, whether considered with reference to the singularity and extent of its provisions, or the circumstance of it being issued by a judge of this district, in an action triable in Steuben county, I venture to assert has

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no precedent in the books. I do not stop to inquire why those who wished to bring an action in Steuben county were not told to go to that district for any preliminary order, instead of having it granted to them by a justice of this district. Certainly that would have been the ordinary course, it having hitherto been considered that the justices in this district had quite enough occupation without interfering in suits triable in other districts; and a departure from the general practice might reasonably provoke remark and inquiries, which, however, I do not deem it right or worth while to pursue. The real question is, was that injunction a valid exercise of judicial power, or was it a void act. No such jurisdiction was exercised by the court of chancery in this state, in respect to a cause pending in that court. This question was pointedly presented and determined in two cases: *Smith agt. American Life Insurance and Trust Company* (*Clarke Ch. R. p. 307*); *Lane agt. Clarke* (*Id. 309*).

In laying down the rule that an injunction would not be granted by the court of chancery to stay a suit in that court, Vice Chancellor WHITTLESEY, in the case first above mentioned, said: "If a contrary rule should be adopted, it would be difficult in some cases to foresee any termination to litigation;" an apprehension which the present extraordinary proceedings show was very well founded.

The vice chancellor further said, and I cite it to show how unnecessary the course pursued in this case was, and how simple the proper procedure would have been: "This rule will not work any injury. A party, privy or even a stranger to the pending suit, is not without redress. He may apply by petition in the original cause, for such an order as the case made by his petition will entitle him to." Again, in *Lane agt. Clarke* (*supra*), the vice chancellor said: "Proceedings in this court will not be restrained by injunction issuing out of this court upon a new bill, whether filed by a party privy or stranger to the old bill. The only mode is to apply by petition for an order."

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The jurisdiction of the court of chancery to restrain proceedings in other courts, acting, of course, upon the parties to the litigation, and not the courts, is undoubted; but that is a very different thing from enjoining the parties from prosecuting the suit in the court of chancery itself. Such an absurdity as, in effect, to enjoin itself, the cases above cited show that the court of chancery in this state would not commit.

The question of the jurisdiction of one court to enjoin proceedings pending in another arose in the superior court of this city, after the adoption of the constitution of 1846, in the case of *Grant agt. Quick* (5 Sand. S. C. R. p. 612). Judge DUER said: "The only ground upon which the court of chancery formerly acted in granting an injunction in cases like the present was the inability of the court of law in which a suit was pending to grant the necessary relief; but, as, since the Code, the jurisdiction of all our courts is equitable as well as legal, or more properly, as the distinction between legal and equitable, except in reference to the nature of the relief demanded, is now abolished, the reasons by the exercise of a power always invidious, and frequently abused, could alone be justified, have ceased to exist, and have left a case to which the maxim emphatically applies, "*cessante ratione, cessat etiam lex.*" He proceeds to show that the court of common pleas, in which the action sought to be enjoined was pending, had complete power to give relief to the parties, and then says: "The previous jurisdiction which that court has acquired I have no right and will not attempt to disturb." This case decides that the necessity for the exercise of the right to enjoin a suit in another court having ceased, the law—the jurisdiction—to do so also ceased. And that case was communicated by Judge DUER to the judges of the supreme court in the first district, the judges of the court of common pleas, and to the judges of the superior court, at a consultation held by all of them, and unanimously approved. It will be difficult for the courts

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thus concurring to maintain that jurisdiction exists any longer in one court to enjoin the proceedings in a suit in another court having full power to hear and determine the whole litigation, and to protect the rights of all parties connected with it.

This really disposes of the present case; for there can be no pretence that the supreme court, from the moment Mr. Schell's suit was commenced, had not full jurisdiction, and indeed it is that very jurisdiction which is sought to be invoked by the parties who obtained the injunction from Judge CLERKE.

The constitution of 1846, designing to blend legal and equitable remedies within one jurisdiction, abolished the court of chancery and created one court, termed the supreme court, having general jurisdiction at law and in equity; consisting of many judges, but all constituting but one court; and when either judge acts judicially the court acts. In that court Mr. Schell brought his suit against the Erie Railway Company and others, and an injunction which should prevent his appearing at the bar of the only tribunal to which he could apply for relief, would be, as it was aptly termed by the distinguished counsel for the respondents, "a monster in jurisprudence." Everybody interested could, on motion, have been made a party to the suit made by Mr. Schell, and all the relief that any one was entitled to could have thus been obtained.

The theory that by bringing another suit, and simply laying the venue in a different county, the court could be divided up so as to enable one branch of it to enjoin suitors from proceeding in another branch of it, is entirely inconsistent with the existence of but one court which the constitution created. That court, in the very nature of things, has no power to enjoin a suitor in it from asking to be heard, and every attempt to do so is simply and only void.

The idea that a cause, by such manœuvres as have been resorted to here, can be withdrawn from one judge of this

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court and taken possession of by another; that thus one judge of the same and no other power can practically prevent his associate from exercising his judicial functions; that thus a case may be taken from judge to judge, whenever one of the parties fears that an unfavorable decision is about to be rendered by the judge who up to that time had sat in the cause; and that thus a decision of a suit may be constantly, indefinitely postponed, at the will of one of the litigants, only deserves to be noticed as being a curiosity in legal tactics, a remarkable exhibition of inventive genius and fertility of expedients to embarrass a suit, which this extraordinarily conducted litigation has developed.

For these, among other reasons, I think the injunction of Mr. Justice CLERKE absolutely void, and no impediment to the order of Mr. Justice BARNARD.

I have not overlooked the remark of the eminent senior counsel for the appellants, that "the due order of judicial proceedings is involved." I really think it is. No one who reviews the proceedings in this litigation can fail to see that, unless the view I have taken of the question be sound, almost endless litigation and inextricable confusion may be created in nearly every case of any importance; and above all, that if judges of the same court, instead of leaving each case to its "due order of proceedings," shall countenance efforts to circumvent and defeat the orders and decisions of each other, the court itself will soon justly forfeit the confidence of the public, fall into disrepute, and its usefulness be seriously impaired, if not wholly destroyed. Such a practice as that disclosed by this litigation, of judges sanctioning attempts to counteract the orders of each other in the progress of a suit, I confess, is new and shocking to me. It had no existence in the practice of the court of which I was recently a member, where the judges are not only gentlemen, having confidence in each other—never ascribing improper motives in judicial action to either of their associates, and never permitting any one to impute such to either

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before the other—but are scrupulously careful that the conduct of every legal proceeding shall be “due and orderly;” and I trust that we have seen the last, in this high tribunal, of such practice as this case has exhibited.

No apprehension, real or fancied, that any judge is about, either innocently or willfully, to do a wrong, can palliate, much less justify it. For any such wrong there are abundant means of redress, and to those, unaided by judges in such artifices as have been attempted in these proceedings, everybody should be left to resort.

The order appealed from should be affirmed.

BARNARD, P. J., concurred.

COURT OF APPEALS.

WILLIAM BUSWELL, appellant, agt. HORACE J. POINER,
respondent.

Parol evidence is admissible to contradict or explain a receipt of payment given by a party for goods or property sold: Thus, “received payment by note, three months,” and “received payment of M. K. & Co.’s note, four months.”

Such receipts constitute no agreement between the parties that the notes mentioned therein, shall be taken as absolute payment, and therefore, being merely receipts, may be explained by parol evidence, by showing that the notes were not paid, and were valueless.

Where the only issue formed by the pleadings, is the fact of payment in the manner set up in the answer, the affirmative of such issue is upon the defendant.

September Term, 1867.

THE plaintiff, as the assignee of Buswell & Son, lumber merchants of Troy, brings this action to recover the amount of four several bills of lumber sold to the defendant, a resident of Newark, New Jersey, in the summer of 1856. The answer of the defendant admits the sale and delivery of the lumber to him, as stated in the complaint, but sets up as a defense that the defendant paid the said firm of Buswell & Son

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in full for each of said claims; that such payment was made by and with several promissory notes of the firm of Mann, Kendrick & Co.; and by them accepted in full payment and satisfaction of each of said claims, and of every part thereof. The only issue, therefore, formed by the pleadings was the fact of such payment in the manner set up in the answer.

S. HAND, *for appellant.*

W. A. BEACH, *for respondent.*

DAVIES, Ch. J. The affirmative of this issue was upon the defendant. He admitted the purchase by, and sale and delivery to him of the property of the plaintiff's assignor, and he sought to discharge himself of his liabilities to pay for the same by setting up payment. To maintain his defense he put in proof four several receipts of the plaintiff's assignor, attached to the said four bills of parcels, three of which were in these words: "Received payment, by note, three months," and the last, "received payment of M. K. & Co.'s note, four months." It appeared in proof that the notes so given were those of the firm of Mann, Kendrick & Co. One of the firm of Mann, Kendrick & Co., which firm was located at and transacted business in Troy, testified on the trial that the defendant usually came to Troy and selected such lumber as he wanted; the bills were sent to us, we gave our notes, and charged the lumber to him; usually, the next time he came up he gave us his notes.

The plaintiff gave parol evidence to contradict that part of the receipt given by Buswell & Son, which states that the notes of Mann, Kendrick & Co. were received by Buswell & Son as payment. The defendant's counsel objected to such evidence, and the court overruled the objection, and the defendant's counsel excepted.

The court charged the jury that the said receipts might be explained by parol testimony, and to this part of the charge the defendant's counsel also excepted. The defendant

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also excepted to that part of the charge which held and decided, that if the defendant offered paper which he knew, or had good reason to believe, was not good, and that Buswell & Son did not know it, and they agreed to take it in absolute payment, their agreement would be avoided by the fraud, and the defendant would remain liable.

The jury found a verdict for the plaintiff, and judgment thereon was reversed at the general term, and a new trial ordered.

The first question presented for consideration is, whether the rulings of the judge, in admitting parol evidence to explain the receipts, were correct. We think the authorities in this state, and the decisions of this court, leave no room for further question on this point. Without recurring to all the cases in the books on this subject, it will only be needful to call attention to a few of the most leading.

In *Tobey agt. Barber* (5 Johns. 68), a receipt had been given and indorsed on the counterpart of a lease for \$168, "and in full for the second and third quarters' rent."

The plaintiff offered to prove that the defendant had procured one Coffin to give a note, payable to the plaintiff, or order, for \$115.68, at the bank of Columbia, in four months, and dated the same day as the receipt, and that it formed a part of the receipt; that Coffin failed before it became due, and took the benefit of the insolvent act; and that the note had not been paid. This evidence was objected to, and admitted. The judge charged the jury that a receipt was not conclusive evidence, but might be explained by parol. The court held that a receipt is an exception to the general rule, that a writing cannot be explained or contradicted by parol, citing *Ensign agt. Webster* (1 Johns. Cases, 207), and that the parol evidence was admissible. The court say: "The parol evidence was, then, admissible in this case, to show that the receipt of the 24th of September, 1803, though purporting to be in full for two quarters' rent, was founded partly on a note given by one Coffin to the plaintiff, by the

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procurement of the defendant; and that Coffin became insolvent before the note fell due, by which means the note was not paid. The taking of the note was no extinguishment of the debt due for the rent. It is a rule well settled, and repeatedly recognized in this court, that taking a note either of a debtor or of a third person for a pre-existing debt is no payment, unless it be expressly agreed to take the note as payment, and to run the risk of its being paid." The court in its opinion refers to the case of *Murray agt. Gouverneur and Kemble*, decided in the court of errors, in 1800 (2 *John. Ca.* 438), where it was held that receipts were explainable, and that a bill was not a discharge of a precedent debt, unless by express agreement; and that a receipt of a bill as cash was not sufficient evidence that the bill was taken as an absolute payment. This case is cited with approval in *Egleston agt. Knickerbacker* (6 *Barb.* 458); and in that case it was decided that the paper writing sought to be explained by parol evidence was the agreement between the parties, and not a receipt, and the head-note is: "Parol evidence is inadmissible to contradict or explain a written agreement." This case was relied upon as the basis of *Coon agt. Knap* (4 *Seld.* 402). There it was held that parol evidence was not admissible to explain a release, and that the paper offered in that case was not a simple receipt, which it was conceded could be explained or varied by parol evidence. The paper writing in that case was in effect a release of the defendant from all liability occasioned by that transaction. In *Filkins agt. Whyland* (24 *N. Y. R.* 338), this court had occasion to consider the question whether a writing in this form—"F. bought of W. a horse, \$150; received pay, W."—given upon the purchase of and payment for the horse, was a mere receipt, and held that the same was a mere receipt, and not a contract or bill of sale, so as to exclude parol evidence of a warranty of soundness of the horse by the vendor. Judge Wright, in his opinion in this case, says: "The paper in this case is to be construed as a simple receipt, delivered and

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accepted as evidence of payment, and not the contract by which the title to the horse was transferred. The paper cannot be read as a present agreement of sale. It contains no stipulations to sell or to buy, nor declares any present undertaking by either party. The vendor acknowledges payment, but he does not profess, by the writing, to sell. The vendee does not execute, but accepts it. It recites the fact of a past sale. It admits that a sale has been had, but does not affect one. A merchant's bill of items of goods sold, made up and receipted in the same form, has never been regarded as the written contract of sale." These observations are pertinent to the case at bar, and conclusively show that the four paper writings relied upon by the defendant to sustain the defense set up in his answer, were neither releases, contracts of sale, or agreements, but simply receipts which, upon most abundant authority, could be explained by parol evidence. And the court properly overruled the objection to the admission of such evidence. The exception to the charge of the judge that such receipts might be explained by parol testimony is equally untenable. The general term of the supreme court was incorrect in holding that there was error in those particulars, and reversing the judgment, and ordering a new trial. This would make it unnecessary to examine the exception taken to the judge's charge in reference to the alleged fraud of the defendant, in transferring the notes of Mann, Kendrick & Co., knowing that the same were not good, and would not be paid. The order granting a new trial should be reversed, and the judgment on the verdict should be affirmed, with costs.

All concur, except GROVER and PARKER, JJ.

Judgment accordingly.

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N. Y. SUPERIOR COURT.

GUSTAVUS MONEYPENNY agt. THE SIXTH AVENUE RAILROAD COMPANY.

When the Sixth Avenue Railroad Company of the city of New York, the defendants, secured its charter, it was with the tacit understanding they could charge *five cents fare in specie*, that being then the lawful money.

An extraordinary crisis arose, compelling the general government to issue a paper currency, which enhanced the value of the original fare, and justified the defendants in advancing their fare one cent, when paid in paper.

The law of congress, passed 1864 (*Statutes at Large, Thirty-eighth Congress, p. 485*), justified the city railroad companies in adding the additional cent to the fares, even if the paper currency had not depreciated the original fare; and passengers are bound, if they wish to ride by these cars, to pay such additional cent.

The penal act of 1857, against railroad companies, does not apply to city railroad companies, and by operation of law the penalty sought for against these defendants cannot be recovered.

Special Term, June, 1868.

THE plaintiff, Money Penny, refused to pay the extra cent charged by the railroad companies, and was consequently put off the cars. Suit was then brought by him to recover the penalty under the general railroad act of 1857.

The defendants answered that the general railroad act did not apply to city railroads, and that it was intended only to apply to the railroads of the interior of the state.

To this answer plaintiff demurred, and the question now comes up on the demurrer.

Mr. SLAUSON, *for defendants.*

Mr. ———, *for plaintiff.*

McCUNN, J. The first question is, whether the penal act of 1857 applies to city railroads incorporated under the general act of 1850, but whose fare for the transportation of passengers was fixed or regulated by contract with the city authorities, who bestowed the grant, and which contract has been confirmed by the legislature of 1854.

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The act of 1857 refers by its very terms only to companies other than city companies.

In *Chase agt. New York Central Railroad Company* (26 N. Y. R. 526), the court says, "that the statute of 1857 has reference to the statutes in which the rate for carrying passengers is fixed and allowed," and not to exceed two cents per mile, and that it has no reference whatever to city roads. Indeed, the language of the act shows that it could not have been intended to refer to companies whose fare was fixed at a sum certain for any distance, great or small.

The penalty is prescribed against any company which shall ask and receive a greater rate of fare than that allowed by law, to wit., two cents per mile, and declares that it shall be lawful to take the legal statutory fare for one mile for any fractional distance less than a mile.

Unless, therefore, the fare of the defendants in the present action is to be governed by the mile, and not by their contract with the city, under which they have always received their fare, but by the general railroad act, it is manifest the act of 1857 has no application.

The act was never intended to apply to a city railroad company who are carriers of passengers only, and this is manifest from the language of the statute, which provides, that every corporation formed under it shall have power "to regulate the time and manner in which passengers and property shall be transported, and the compensation to be paid therefor; but such compensation for any passenger and his ordinary baggage shall not exceed three cents per mile. It would therefore be impossible to apply it to a city railroad.

The railroads of the interior have stations at fixed points, from and to which the fare is computable, and at which passengers get in and out of the cars. With our city roads, a passenger gets on and off at all points. He pays his six cents and rides to where he pleases. Moreover, if the act of 1857 had any application to city roads, these defendants may use "steam" (*sub. 7, 5, 28*), and may demand an extra

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five cents from passengers not purchasing tickets (§ 87), and the companies are also obliged to erect fences along their entire route (§ 56), and may also take all the real property they require for the purposes of their business (a depot, for instance), and acquire the legal title against the will of the owner (§§ 13, 14, 32). It is clear, therefore, that the general railroad act is not to be stretched beyond its reasonable application. But, in addition to all this, the act of 1854 takes the whole subject of fare out of the operation of section 28 of the general act.

This act (act of '54) applies exclusively to city railroads which commence and end in the city; it authorizes the common council to grant the right to construct and establish railroads, upon such terms, conditions and stipulations in relation thereto as such common council may see fit to prescribe. Now these defendants had been actually incorporated nearly three years at the time of the passage of this act, and had in part constructed their road. They therefore came within its provisions, and by its very terms they were placed in the position in which they would have been had they obtained their license from the common council after the passage of the act, and in strict compliance with its terms.

But while the act of 1854 ratified and sanctioned the agreement made between these defendants and the common council, and thus took the subject of fare out of the general statute of 1850, it did not make the fare fixed by that agreement a matter of statutory enactment; it did not make the fare "allowed by law," in the language of the penal act of 1857; it was still a fare regulated by contract. The act confirming the contract says nothing about fare, it leaves that as found and provided for in the resolutions and contract between the city and the company. It made valid, if you please, a voidable contract, and gave legislative sanction to all its provisions, that of fare included.

It follows, from all that has been said, that the fare of

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these defendants is regulated, not by the act of 1850, as claimed by the complaint in this action, but by the agreement with the city corporation, and it equally follows that the act of 1857 has no application to these defendants. Therefore the penalties claimed in this action cannot be enforced.

There is an exception taken by the defendants to the complaint, in this, that in no count does it allege that the plaintiff informed the conductor, on entering the car, how far he was going, or that he objected to pay the six cents. This exception is well taken; but after what I have said above, it is not necessary to discuss the proposition.

The remaining question, the one submitted without argument, was whether, under the circumstances, these defendants had a right to receive the extra cent from passengers. Compacts, by whomsoever entered, should be kept. That men and companies are equally bound by such is self evident; but it is also evident that if one party performs not his part, the other is released from the performance of his. This is a proposition no being can dispute. Justice, right and reason require it, and the law of nature commands it.

But extraordinary occasions may now and then occur in which the happiness of the people may be better promoted by acting for the moment in opposition to the law than in strict observance to it.

Here an occasion did arise—a crisis, it would seem, that could not be avoided. And although the interests of this company were but a mite, as it were, in the great drama enacted, yet they were completely drawn into its vortex, suffered by its effects, had to do as all other corporations did in the emergency, sustain themselves as best they could.

The calamities of a civil war broke upon the country; its people and territory were for a time divided; foreign nations looked upon that division as final and permanent, and as for asking credit abroad under the circumstances was simply preposterous. Something had to be done to save the insti

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tutions. A scheme was therefore adopted, and although it upset in the minds of some, many of the old notions of statesmen and constitutional lawyers, yet it was a complete success; for it carried a people through the most fearful ordeal that ever a nation was subjected to, without being dependent on any other power for the credit of a single shilling. The measure that benefits most a country, and tends to elevate and make its people great and happy, when it does not invade or encroach on the rights of other nations or other people, will always be deemed constitutional, whether it is in accordance with the written instrument or not, and future ages, viewing it in the light that those means are the most correct which best accomplish the end, will declare it constitutional because of its success. In other words, I deem that constitutional which benefits the nation, and of which the whole people approve. No law can have much effect which is not backed by the general conscience of the community, and it is for the want of such backing that fanatical and partisan laws are often disregarded.

I will say here that the scheme resorted to does credit to the intellect that conceived it, and it does infinite honor to the mass of the people who accepted and were satisfied with its terms for the time being, as the only method to save the country from ruin.

At the time this company received its grant, there was nothing but specie received as fare, and it was upon such a basis they obligated themselves to build the road for the accommodation of the public.

In the necessity of the moment, the general government passed laws creating paper currency, the effect of which was to withdraw coin as a circulating medium and made it an article of merchandise only, and to substitute the created currency, and the five cents which the company charter enabled them to levy from passengers was enhanced in value to twice that sum in paper. The consequence was that passengers declined to pay in coin, and this company, when

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they saw they could not obtain pay in that form, advanced their demand to six cents in paper.

Now mark you, this was done, if you please, to save the company from bankruptcy, but it was also to enable them to run their cars so as to accommodate our rapidly growing community. Under the circumstances, they were justified in the course they pursued.

In the ordinance conferring this grant there is a promise required of the company to carry passengers for a certain price, and the consideration for that promise was that the grantees could levy five cents in coin from each passenger so carried; and I cannot find, in the papers before me, that they violated that promise by refusing to receive the fare in specie. On the contrary, it is before me that the public, under the pressure of the moment, compelled this company to receive in payment, instead of five cents in coin, to which they were entitled, a paper currency that was not equivalent at any time to the original fares fixed in their charter.

It is urged that the law of congress (1864), allowing this company to add the extra cent under the revenue laws, is not constitutional. I do not agree in saying so. Moreover, I hold that companies, under the circumstances, have just as much right to add the extra cent to their fare, to enable them to cover the tax imposed by the general government, as the landlord has to raise his rent, or the merchant to increase the price of his commodities, for the like purpose. And I will say more, that when we return to a gold and silver basis, and legal minds get running again in the constitutional groove, if the law which creates this paper currency is discussed in connection with that allowing them to charge the extra cent, the one will be found to be equally as constitutional as the other.

These views may not accord with the clamor raised sometimes against railroads or corporations, but the executors of the law should at all times be so far master of their opinions as not to allow their minds to be warped by every gust of

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passion which may overbear, for a moment, the reason of the people. I am satisfied, and do maintain, that if congress had a right to create the currency and make laws enabling it to pass for money, and that was the cause of depriving the railroads of the five cents in specie, they, in return, had an equal right, under the circumstances, and without the aid of the law of 1864, to require the one cent extra. Nay, more, I hold that in all fairness they have as good a right to exact the full equivalent in paper money for the five cents in coin which their charter guaranteed them, as the general government has to sell gold coin by the million for double its value in greenbacks. I, therefore, cannot join in this hue and cry against railroads, when, perhaps, they are doing all in their power to accommodate our citizens. Certain it is that these companies have added largely to the wealth of our city, by affording its people ready access to all its parts, enabling them to reside on our island, thereby increasing the value of its property. The good done in this way is often forgotten, and our people are frequently misled by designing persons, who carp against corporations from selfish motives.

Now, in this case I do not intend to mislead; on the contrary, I shall be plain, so that all can understand, and that there may be no bickering and breaches of the peace between the employees of companies and the passengers, until this question is disposed of in the court of last resort, I hold—

1st. That when the company secured its charter, it was with the tacit understanding they could charge five cents in specie, that being the lawful currency then.

2d. That an extraordinary crisis arose, compelling the general government to issue a paper currency, which enhanced the value of the original fare, and that they were justified in advancing one cent when paid in paper.

3d. That the law of congress, passed 1864 (*Statutes at Large, Thirty-eighth Congress, p. 485*), justifies the companies in adding the additional cent to the fares, even if the paper currency had not depreciated the original fare, and

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that passengers are bound, if they wish to ride by these cars, to pay such additional cent.

4th. That the penal act of 1857 does not apply to city railroad companies, and that by operation of law the penalty sought for here cannot be recovered.

Judgment must therefore be entered for the defendants overruling the demurrer, with costs.

N. Y. SUPERIOR COURT.

PETER HAACK agt. HENRY S. FEARING.



In an action for damages for a personal injury received by the plaintiff from the wadding of a cannon negligently discharged on board of a pleasure yacht of the defendant, by one of its crew during the absence of the defendant, and in violation of his positive general order, the plaintiff cannot sustain his action, where there is no evidence that the cannon was fired in the course of any employment or duty of the master of the yacht; but merely as a salute to another yacht, in passing.

Neither can the action be sustained on the ground that in permitting the master of the vessel to have the possession and custody of the gun and ammunition, with other equipments of the yacht, the defendant became responsible for their careless use. Such possession and control cannot create or imply permission, much less authority or duty to use them in the face of positive orders of the defendant to the contrary.

The defendant, under the doctrine of liability of master and servant, would have been liable, if the sailing-master had injured a person or vessel by *careless navigation* of the yacht under his charge, as that would have occurred while performing the duty and ordinary employment of a sailing master.

It could not be any part of the duty of sailing or taking care of the yacht, to discharge signal guns or give salutes. (McCUNN, J., dissenting: *Holding that it became a part and parcel of the duties of a pleasure yacht crew, and a universal custom, to observe all those amenities and civilities which can by possibility pass between gentlemen able to afford such luxuries, and which are expected to be exchanged; such as salutations by displaying flags, firing guns, and exchanging other courtesies, &c.*)

General Term, October, 1867.

THIS was an action for damages, for a hurt received by the plaintiff in July, 1866, from the wadding of a cannon negligently discharged on board of a vessel or pleasure yacht (the Rambler) of the defendant, by one of its crew during

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the absence of the defendant. The signal of the New York Yacht Club was generally used on board of such vessel, which indicated that she belonged to the squadron of that body, but there was no other evidence offered on the trial of its being so. On the occasion in question the gun was discharged about two or three o'clock in the afternoon of a day in July, 1866, while the vessel in question was being towed by a steamtug to her anchorage near Hoboken, where other yachts were lying. The plaintiff received the injury while on board of a ferry boat, passing between the yacht in question and the shore. A witness (Smith) testified on the trial that he has not often seen yachts come to that anchorage without firing a salute. It was usual for them to do so. It was customary, but not always done. But finally said that he knew nothing as to the custom in firing salutes. Some did it and some did not. Another witness (Morrill) only knew of such a custom up to 1859. The vice commodore of such club squadron (Major), when the accident happened, testified that there was no rule of that club which had any bearing as to firing salutes, and no universal custom by any means of firing guns by yachts while approaching their anchorage; "that it was" a thing done by some persons and not by others; that yachts sometimes saluted on meeting and sometimes not.

He also testified that the firing of salutes did "not come under the scope of the general duty of a sailing-master;" that it did "not come under his supervision unless he had been particularly requested so to do;" there was no duty of his as to firing salutes, except to obey the orders of his superior officer. A rule of such yacht club (14), for setting colors in the morning and lowering them at sunset, when two or more yachts sailed in company or were at anchor in sight of each other, was the only one as to firing guns. It prescribed that in such case the time for so hoisting or lowering colors should be taken from the senior officer in command, and that no guns should "be fired in setting or hauling down

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the colors, except by the yacht giving the time. This was all the evidence on the trial as to the duty or any custom of firing guns on anchoring or meeting another yacht, or on another occasion. The mate of the yacht in question (Hoffman), who was examined as a witness for the plaintiff on the trial, testified that when the gun was fired he was getting the anchor ready to drop it. That two years previously (being shortly after the yacht was built), because a man had been hurt by discharging such gun, the defendant gave general strict orders to all the crew not to fire any guns unless he was on board; and again in the previous summer at New London, such orders were known to all on board of the boat. They had fired such a gun a dozen times when approaching such anchorage while the defendant was on board; they sometimes fired it and sometimes not; they fired it off once or twice without the knowledge of the defendant. He was not on board at the time of the accident in question. Such witness testified that he supposed it was fired to salute the yacht Wave, and not the tugboat which blew its whistle; and that they had orders not to use any wadding in firing guns. The plaintiff was injured by the wadding. On the trial the defendant's counsel moved to dismiss the complaint, which motion was granted, and the exceptions taken thereto, and on the trial ordered to be heard, in the first instance, in general term.

MR. CADWALADER, *for defendant.*

MR. COUDERT, *for plaintiff.*

ROBERTSON, C. J. I have not been able to find any evidence in this case that the gun, whose discharge caused the injury to the plaintiff, was fired in the course of any employment or duty of the master of the vessel in question. It was not necessary in the course of its navigation, or as a matter of duty to other vessels, or in compliance with any custom governing vessels in general in New York harbor, or yachts

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belonging to the New York Yacht Club Squadron, if the vessel in question belonged to that squadron, or was bound by the rules of that club, of which there does not seem to have been sufficient evidence. So that the ground of the defendant's liability is reduced to the question, whether, by merely permitting the master of the vessel to have the possession and custody of the gun and ammunition, with other equipments of the vessel, the defendant became responsible for their careless use. In the case of *Lambt* agt. *Lady Polk* (9 *Car. & P.* 629), the defendant was held not liable for the negligence of her coachman, who, after descending from his box, had, in turning aside the head of a horse harnessed to a van which obstructed his passage, precipitated a box of mineral waters from such van upon the shafts of the plaintiff's gig and broke them, because the act was not done in the course of the coachman's employment for the defendant. In the case of *Mitchell* agt. *Crassweller* (13 *C. B.* 237, 16 *Eng. L. Eq.* 448), it was held that for an injury done by the negligence of the defendant's carman to a third person, in driving his employer's horse and cart, for his own private purpose, after the time when he should have, and usually did, put up such horse and cart in their stable, the employer is not responsible. In the case of *Joel* agt. *Morrison* (6 *Car. & P.* 501), and *Sleath* agt. *Wilson* (9 *J.* 607), it was conceded that if a servant drives for his own purposes his master's carriage without leave during the time it is not in use for the business of the latter, the master is not liable for any injury caused by its means while so driven. Although, in both, it was held that if while driving for his master's business, the servant merely make a detour for his own purposes, his master is responsible for his negligent driving during such deviation. That distinction is made in both such cases to rest on the fact that, in the latter event, the master has enabled the servant to do the injury, by the mismanagement of the carriage while intrusted with its use for the master's benefit. That doctrine would have applied in this case, if the sailing-

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master had injured a person or vessel by careless navigation of the vessel under his charge. The mere possession and control of the gun and ammunition could not create or imply permission, much less authority or duty to use them in the face of the positive orders of the defendant to the contrary. It could not be any part of the duty of sailing or taking care of the vessel to discharge signal guns or give salutes, and there was no evidence of a uniform custom on the part of the vessel in question, or any other yachts, or of any regulation to that effect in the squadron to which it was supposed to belong, to make it part of the ordinary employment of the sailing-master. I apprehend there is no difficulty in a general limitation of the extent of the employment of a servant by agreement or command, so as to prevent him from doing acts of a particular character. It is true that the prohibition of specific acts within the scope of a general employment on a particular occasion only, or of a particular mode of doing them may not exempt the employer from liability. But prohibiting their being ever done must certainly curtail the extent of the employment; and the language of Justice STORY (*Agency*, 452), in declaring the liability of a principal, notwithstanding his prohibition of the acts of his agent, by which third parties are injured, must be construed in that sense. The case of the *Philadelphia and Reading Railroad Co.* agt. *Derby* (14 *How.*, S. C. 295), also can only extend that far, otherwise it is contrary to several of the very cases cited in the opinion there delivered.

I am not aware of any principle which justifies the use by a party of a prior written statement of a witness of such party to instruct him what to say, under pretext of refreshing his memory when he has not shown any weakness of recollection. The case of *Guy* agt. *Mead* (22 *N. Y. R.* 462), cited for the purpose, does not sustain any such proposition, and the attempt to do it on the trial was properly prevented. I do not understand the question put to a witness as to the extent of the orders given by the defendant as calling for his

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construction of their language, but his recollection of it. He had not previously undertaken to give their precise words. It was, therefore, properly admitted. There being no error committed on the trial, the exceptions should be overruled and judgment given for the defendant dismissing the complaint on the merits, with costs.

McCUNN, J. (*dissenting.*) I regret I must dissent in this case. On the 30th of July, 1866, as the yacht Rambler, of the New York yacht squadron, was about to drop anchor at her rendezvous in the waters of the Hudson, she fired a salute of one gun to the other yachts of the squadron. The wadding of the gun struck and penetrated the side of the ferry boat, on which plaintiff was sitting, knocking him down, breaking his arm and rendering it useless for life. This action is brought against the defendant, the owner of the yacht, to recover compensation for the injury. It appears in the evidence that, in the harbor of New London and in the harbor of Newport, two years previous to the accident, instructions were given by Mr. Fearing, the owner, that no firing should take place on board his yacht, unless he was present, or unless he ordered it to be done. That on the morning of the accident, Mr. Fearing quitted his yacht at Staten Island, and left her in command of a person named Smith, whom he called his sailing master, and directed Smith to proceed to the rendezvous. That Smith, on arriving at such rendezvous, ordered the customary salute to the other yachts, without receiving instructions from Mr. Fearing. On this state of facts, a nonsuit was ordered by the learned judge below, on the ground that "plaintiff had shown no facts to render the defendant liable." I am clearly of opinion that error was committed in granting such nonsuit.

On the trial of the action, an effort was made on the part of the defendant to establish the fact that the witness Smith was not the captain, but the sailing master of the yacht.

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This is of little consequence; indeed, it is quite immaterial whether Smith was known as captain or as sailing master. It is admitted that when Mr. Fearing quit his yacht at Staten Island he placed Smith in the entire command of the ship, and that she was absolutely under his supreme control; and I hold that Mr. Fearing, the defendant, under the circumstances, is liable for the act of Smith in negligently firing the gun. It is a sound maxim in law, that when a party is injured by the negligence of another, the person causing the injury shall be held strictly accountable, unless the party injured contributed to the accident, which was not the case here. There is no pretence that plaintiff was in the slightest degree negligent. On the contrary, he was sitting in the cabin of the ferry boat, on his way from New York to his home in Hoboken, when this shot plunged through the side of the boat and caused the injury which has invalidated him for life. Surely, if courts are intended to afford a remedy for gross negligence, there never was a case in which the refinements of the law should be brought to bear by the judges to enforce such remedy more than in this case. The plaintiff had been attending his daily toil, and was returning to his family, secure, as he thought, in all things which render life safe, when this defendant and his servants, after returning from a trip of pleasure, in the most negligent and careless manner did an act which resulted in the injury. A glance at the evidence must convince an ordinary mind that it was not only carelessness, but carelessness of the grossest kind.

The act of Master Smith in firing the gun was within the strict line of his duty, and the defendant Fearing, by placing Smith in command of his yacht and in the possession of the implements to do wrong, rendered himself liable; for I lay it down as a broad, general principle, that wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must suffer. In treating the question herein, we are compelled to

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withdraw ourselves from the ordinary method of looking into such cases, because the facts and circumstances are not altogether within the scope of ordinary business transactions. For instance, this was a pleasure yacht; she was the means adopted by her opulent proprietor to gratify his tastes; and all those amenities and civilities which can by possibility pass between gentlemen able to afford such luxuries are expected to be exchanged, such as salutations by displaying flags, firing guns, and exchanging other courtesies, and which, I hold, become a part and parcel of the duties of the yacht crew. The vice commodore of the squadron testifies, "that the salute to the flag (the one causing the injury) was in accordance with the rules of the club," and the club rules declare such amenities and civilities to be a part of their duties. If such civilities are not part of the ordinary duties of a pleasure yacht and her crew, then it is hard, indeed, to say what their legitimate duties are; they do not engage in commerce, they do not contribute to the welfare or happiness of the community in general, but to the pleasures of the few who associate together; and their polite courtesies to each other, I hold, is part of their legitimate business; and, when they commit an error or a wrong, in carrying out these pleasures, upon one of the community, they should be held strictly accountable.

Once at Newport, in firing a salute from the same yacht, a similar accident occurred, and then it was admitted that Smith was acting within the limits of his duties, and it was because Mr. Fearing believed that the firing at Newport was part of the duties of his crew that he forbade firing thereafter unless he was on board or gave special directions to do so. Indeed, the fact that the firing was specially prohibited, unless at certain times, is the strongest evidence that it was within the ordinary bounds of the crew's duty; else why prohibit it? Smith had been the commander and sailing master of the yacht for years past, and he knew well what his duties were; and if the firing had not been a part of his duties,

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even without instructions from Fearing, it must be presumed he would not have fired the gun. But it is manifest that it was because he believed he was performing his duties that he tendered this salute to the squadron. It must, therefore, be taken for granted that the act of Smith, whereby the accident occurred, was strictly within the line of his duties, notwithstanding he was forbidden to perform it; and it is an elementary principle that you cannot bind innocent and third parties, who have been injured, by proving private instructions to servants not to perform certain acts, acts ordinarily performed within the line of their duties.

After having said thus much as to what their legitimate duties are, let us see whether Mr. Fearing would not be held liable for acts done by his commander, which injure others, even if those acts had been some two years before prohibited. Suppose Captain Fearing to be on board his yacht, his sailing master, Smith, in command of the vessel, the wind abeam; and another vessel is seen approaching in directly the opposite course, having the wind also on her beam, and the ships are meeting end on, and Captain Fearing gives the command to put the helm to port, which is the proper command, the other vessel having received the like command, and, instead of putting the helm hard to port, Smith, the sailing master, in the face of Mr. Fearing's command, puts his helm hard a starboard, and a collision takes place; Mr. Fearing or his vessel would certainly be held liable for the injury to the other vessel; because article 2 of an act fixing rules and regulations for preventing collisions on water, passed April, 1864 (and which, by the way, is now the sailing regulation of all the world), declares, "if two sailing vessels are meeting, end on or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other." Now, this is the aptest kind of an illustration; and if Mr. Fearing had been absent from his vessel, and the sailing master had, after receiving positive instructions from Mr. Fearing to obey

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the law in relation to putting his helm to port, instead of putting his helm to port, put it hard to starboard, thereby causing the collision, surely the absence of Mr. Fearing would not have exonerated his vessel or himself from liability, more than if he had been on board; and certainly the law will hold Mr. Fearing strictly liable for the acts of his sailing master in firing this gun improperly, as much as it would for the act of such sailing master in disobeying his orders, as I have illustrated above.

I might stop here without citing a single authority, because I hold that judges are not bound to treat the court as a thing of words, dates, readings and decisions, but as a living fact, in close relation to other living facts, and having in itself the germs of growth and change; and I would be justified in saying, without adding another word, that the judgment below should be reversed and a new trial ordered. But let us see what some of the most eminent elementary writers and some of the ablest decisions say upon this question. One of the earliest cases in the books, and one directly in point, is to be found in the first volume of decisions of Lord MANSFIELD, by *Evans*, page 98. That was the case of the capture of a ship by the enemy, where it was agreed between the captors and the captain of the captured ship that one of the sailors should be retained as a hostage until the ransom fixed by the captain with the enemy for the ship should be paid. The sailor consented to be retained or imprisoned by the enemy, provided that the owners of the captured ship would, during his captivity, pay his regular wages, which was agreed to by the captain. The captain brought the ship home, but the agreement on his part with the captors was repudiated by the owners, and the ship was sold for the benefit of the captors. After the seaman obtained his liberty he returned and sued the owners for his wages during his imprisonment. The answer set up was, that the captain had no authority to bind the owners in such a case, and that his doing so was illegal and entirely without the line of his duties, and con-

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trary to the statute law of England. Lord MANSFIELD, delivering the opinion of the court, held that, although it was not within the strict line of his ordinary duties, and although the law forbade the captain doing so, yet, as the captain believed he was doing his duty when ransoming the ship, and upon principle, he should recover. And this decision was coincided in by all the legal minds of the day. Now, there was an unlawful act perpetrated by the captain, an act forbidden by his owners and by the law of the land, and one which might be considered entirely beyond the line of his duty; and yet, because the sailor was injured by detention, and because the captain had it in his power so to stipulate, it was held he could recover. The next case of any moment we find in the English books is that of *Sleath agt. Wilson* (9th Car. & Payne, 612), decided by Lord ERSKINE, wherein that able jurist held "that whenever the master intrusted the servant with the control of the horses and carriage, it is no answer that the servant acted improperly in the management of it." "If it were, proceeds that learned judge, "it might be contended that, if a master directs his servant to drive slowly, and if the servant disobeys his orders and drives fast, and through his negligence occasions an injury, the master will not be liable; but (saith Lord ERSKINE) that is not the law; the master in such a case will be liable, and the ground is, that he has put it in his servant's power to mismanage the carriage by intrusting it with him," and he therefore held that defendant should be held liable.

Now, the case at bar and the one last cited are very similar, notwithstanding the fact that the instruments working the injury were very dissimilar, the one being a servant and a pair of horses, and the other being a servant and a yacht. Both disobeyed the instructions of their masters, and both thereby caused injury to the plaintiffs in the different actions. One disobeyed his master's directions in taking the horses back to their stable out of their usual way, to perform

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errands of his own; the other, when taking the yacht, at his master's request, to her usual rendezvous, fired a salute which he was not instructed to fire, thereby causing the injury. The principles involved are precisely similar, and the ruling in the one case should govern the ruling of the other.

The rule that the master shall be liable for the tortious acts of his servant is of universal application. The maxim is "*respondeat superior*." If the act be done in the course of his employment, the master is liable, even if he forbade the act to be done. Such was the decision of Mr. Justice GRIER, in the case of *Derby agt. The Philadelphia and Reading Railroad Co.* (14 How. U. S. S. C. R. p. 483), where the question came fairly up, and where the doctrine I contend for was reviewed and reaffirmed in the most explicit terms. Derby had sued the company for injuries to his person; the locomotive causing the injury was run by an engineer employed by the road, who had express instructions not to run his engine on the road that day. Contrary to such instructions, he ran his engine, and in doing so injured plaintiff, and the company was held liable. Now the case of Derby is precisely similar to the one at bar; there the engineer was on that day expressly forbidden to run his engine on the track; he did run her, and caused the injury, and the company was held liable. Here the sailing master had received instructions two years previous not to fire salutations without permission; while in his master's employ, in bringing up the yacht to her place of destination, he did fire one which caused the injury, and his employer should be held liable. In some of the cases cited on the defendant's points, and in others not on his points, there are to be found *dicta*, which, when severed from the context, might seem to countenance the doctrine that the master is not liable if the servant act in disobedience of his orders; but it will be seen on a careful examination that the question depended on whether he was or was not, at the time, in the relation of master and ser-

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vant; and I know that in some of those cases some subtle and astute distinctions are drawn as to when the servant is acting in his master's employ; yet I can find no case contrary to the views expressed above. The elementary writers all agree that the master is liable for the acts of his servant, although those acts may be contrary to his orders.

Judge STORY, in his treatise on *Agency*, says that the master must be held liable in civil suits for "the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasance or malfeasances and omissions of duty of his agent, in the course of his employment, although the principal did not authorize, or justify, or participate in, or indeed know of, such misconduct, or even if he forbade the acts." Chancellor KENT, in his *Commentaries*, holds the same rule; and both of these eminent writers cite a large number of authorities in support of their views. (*Story on Agency*, p. 537; notes 1, 2 and 3.)

It cannot be said in this case that Smith was not acting in the line of his duty when he fired the gun; he was. He was bringing the yacht to the place where his master directed him to bring her; he was in sole command, and was manœuvring her, exchanging courtesies and salutations with other vessels, all of which was in the strict line of his duty. One act of his duty he was directed, two years before, to omit; he did not omit, but committed the act, and did it so negligently that he injured others. Now, as I have said before, all wrongs have remedies in law, and, pray, where is the remedy here? Who is to compensate this innocent man for the great injury and wrong he has suffered, without the slightest negligence on his part? Not the ferry company, who were carrying him to his home, and who did not contribute to the negligence. It is idle to answer that the plaintiff may have recourse to Smith, when the law gives him the option to sue either the master or the servant. Smith's responsibility is not so apparent as that of the owner of the yacht; but, however that may be, the plaintiff, in the

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exercise of an election accorded him by the law, has chosen to come against the principal. Instead of turning the plaintiff round to Smith, the defendant, as principal, may seek indemnity for any damages he may sustain in this action, by a suit against his agent for disobedience of his instructions.

The judgment should be reversed and a new trial ordered.

COURT OF APPEALS.

PERRY G. TANNER, respondent agt. ANSON C. PARSHALL,
appellant.

Where the principal question litigated upon the trial was, whether the plaintiff sold his horse to the defendant for \$500, or whether he was delivered to the defendant to be taken to New York by a third person and sold on plaintiff's account, and the testimony of the plaintiff and defendant was directly in conflict upon the question: *Held*, that the plaintiff was properly permitted to show that, on the same day that he claimed to have sold the horse to the defendant, he went to his (plaintiff's) store, and, in the absence of the defendant, made an entry in his book of accounts, charging the defendant with the horse, at \$500, and that he *subsequently* exhibited this entry to the defendant, who admitted its accuracy. (GROVER, J., *dissenting*.)

March Term, 1867.

THIS is an appeal by the defendant from a judgment of the supreme court, rendered in the sixth district, in favor of the plaintiff. The action was brought to recover the purchase price of a horse alleged to have been sold and delivered to the defendant in September, 1856, and came on for a second trial at the Otsego circuit, in June, 1860. The principal question litigated on the trial was, whether the horse was sold to the defendant for \$500, or whether he was delivered to the defendant to be taken to New York by one Baird and sold on plaintiff's account; and on this question the testimony of the plaintiff and defendant was directly in conflict, and, with other evidence more or less bearing upon the truth of the version of either party, was submitted to the jury, who found for the plaintiff. On the trial the plaintiff,

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under the objection and exception of the defendant, was permitted to show that, on the same day that he claimed to have sold the horse to the defendant, he went to his store, and, in the absence of the defendant, made an entry in his book of accounts, charging the defendant with the horse, at \$500, and that he subsequently exhibited this entry to the defendant, who admitted its accuracy. The judge allowed the entry to be read to the jury, and charged that it was a circumstance tending to prove the alleged sale. The principal question in the case is, whether this evidence was properly admitted. There are some other questions arising upon the admission and rejection of evidence.

JOHN H. REYNOLDS, *for appellant.*

L. J. BURDETT, *for respondent.*

HUNT, J. This case was eminently one for the jury. We have nothing to do with the decision. We accept it as the correct determination of the disputed facts before them. The legal proposition before us is quite simple. We are not called upon to decide whether the entry by the plaintiff of the sale of the horse to the defendant, in the plaintiff's book, was part of the *res gestæ*, nor are we to decide whether the entry above would have been competent evidence. Here the offer to read the entry was accompanied by the offer, also, to prove that the entry was subsequently read to the defendant, and that he admitted its correctness. That a statement by the plaintiff to the defendant, whether verbal or written, charging the latter with the purchase of a horse, at the agreed price of \$500, which statement was then assented to by the defendant, is competent evidence against the latter, would seem to be too plain a proposition for discussion. The offer, as made, was proved, and was corroborated by the defendant, so far as that he admitted that the statement was read over to him. He denied that he admitted its correctness, or promised to pay it. The charge to the jury was

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upon the same subject matter, and in reference to the whole of the same. I think there could have been no misleading of the jury, and no misunderstanding by them of the questions before them. The judge further charged the jury that, in determining whether the defendant bought the horse and agreed to pay \$500 for him, they had no right to take into consideration the actual value, or the unsoundness of the horse, as a circumstance bearing on that question. If the jury had been engaged in deciding whether the defendant had made a good bargain in purchasing the horse, such evidence would have been material. So if there had been inquiry whether there had been a breach of an alleged warranty of soundness, the evidence referred to would have been important. But it was entirely immaterial upon the question whether the defendant had purchased the horse, or had received him from the plaintiff to sell on his account. As a legal proposition, it could have no tendency to establish either a sale or an agency. There was no error in the instruction to the jury. Neither was there any error in this instruction, that if the defendant heard the remark which the plaintiff's daughter testified that the father made to her, "that he had sold Billy," and did not deny it, it was complete evidence. The presence of the parties there, the taking away of the horse by the defendant, would justify the jury in applying the remark to the horse in question.

Judgment should be affirmed.

GROVER, J. (*dissenting.*) No question was made but that the testimony of the plaintiff, that he read the entry on his book charging the horse to the defendant, at five hundred dollars, and that the latter promised to pay it, was competent. But did this render competent the additional testimony of the plaintiff, that he made the entry immediately after the alleged sale. The case shows that this latter testimony was used as independent evidence of a sale of the horse by the plaintiff to the defendant. It appears from the

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charge that the jury were told by the learned justice that, if the plaintiff made a memorandum or entry of the sale immediately after he got down to the store, it would be a circumstance tending to show the alleged sale. The question is whether the evidence was competent for this purpose. If it was, the charge was correct. If not, the reception of the evidence, and the charge, were erroneous. The only point in issue was, whether the defendant purchased the horse of the plaintiff. Upon this point the evidence was conflicting. The inquiry is, whether reading the entry or charge to the defendant a long time afterwards, and his promise to pay the amount, rendered testimony that the entry was made by plaintiff immediately after his arrival at the store, after the alleged sale, competent evidence of such sale. The testimony of the defendant denying such promise, and that he emphatically repudiated the claim, can have no bearing upon the question. It was for the jury to determine as to the credibility of the witnesses, and the duty of the judge, in deciding upon the competency of evidence, to regard the testimony of each as possibly true. It is an elementary principle that a party cannot give his own acts or declarations in evidence in his own favor, unless a part of the *res gesta*. Making the charge was no part of the transaction between the parties, and not, therefore, admissible upon that ground. How can the alleged promise of payment by the defendant make the time when the charge was made by plaintiff, or the fact that it was made by him, admissible evidence against the defendant? What the defendant had the right of proving was, what occurred between the parties at the time the entry was made, and this as an admission of the defendant. This could not make any other evidence competent, unless necessary to explain the admission which that admission referred to, and which the circumstances showed was referred to in the conversation. This did not include the time of making the charge, or who made it. Evidence, I think, of these latter facts was incompetent, and its admission error

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Evidence of another person was received, that he saw the entry on the book shortly after the delivery of the horse. This was also incompetent. In reference to this evidence, the judge charged the jury that making the charge by plaintiff, immediately upon his return to the store, was evidence of a sale of the horse. This, I think, was also error. This part of the charge was not qualified by stating that it would be evidence provided the jury believed that the defendant had promised to pay subsequently. It would not have been correct if so qualified. There was no pretence that the defendant made any admission of the time when the charge was made, or by whom. The case shows that the defendant might have been prejudiced by this evidence. When the issue was, whether the horse was sold to the defendant, or whether he was to deliver him to Baird to take to New York and sell on plaintiff's account, proof that the plaintiff made such a charge directly after the transaction, and before any dispute arose, might have a controlling effect upon the jury. I think proof of the chattel mortgage given by Baird to defendant also inadmissible. These transactions between Baird and defendant had no tendency to show upon what terms the defendant received the horse in question. The only effect produced thereby would be, possibly, to create a prejudice in the minds of the jury against the defendant.

I think the judgment should be reversed and a new trial ordered.

Concurring in the opinion of HUNT, J., PORTER, WRIGHT, SCRUGHAM, BOCKES and PARKER, Judges, and DAVIES, Ch. J.

Judgment affirmed.

Mason agt. Anthony.

COURT OF APPEALS.

ANTHONY MASON agt. BENJAMIM M. ANTHONY.

An estoppel in pais may be urged against the *defense of usury*. And this estoppel is as applicable to an *indorser* of an accommodation promissory note, who represents that the note is valid business paper, as to the maker of the note.

September Term, 1867.

APPEAL from judgment of the supreme court.

The action was on a promissory note for \$100, made by Wm. Jackson, Jr., to the order of the defendant, and indorsed by him.

The defense was usury. The case was referred to a referee to hear and determine, who found in favor of the defendant. The general term, on appeal, reversed the judgment and ordered a new trial. Thereupon the defendant appealed to this court, stipulating that judgment absolute might be entered against him, in case the order appealed from should be affirmed.

BOCKES, J. The facts found and stated by the referee clearly present the only question involved in this case.

The referee found that the note was usurious in its inception, and was passed to the plaintiff before due; that before the purchase by him, the defendant was informed by the agent of the plaintiff that the latter was about to buy the note, and desired to know if it was usurious; that the defendant replied that it was not usurious, that there was a consideration paid for every dollar of it.

As a conclusion of law, the referee found and decided "that the representations of the defendant, if made by the maker of the note, would have operated by way of an estoppel to prevent his availing himself of the defense of usury; but that an accommodation indorser could not, by his representations, charge the maker of a usurious note, and

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that a recovery against the indorser would in effect charge the maker."

It has been settled in the supreme court, in numerous cases, that an *estoppel in pais* may be urged against the defense of usury, the same as in any other case where the doctrine of *estoppel in pais* is applicable. The decisions in that court are numerous and uniform. (*Ferguson* agt. *Hamilton*, 35 *Barb.* 427; *Chamberlin* agt. *Townsend*, 26 *Barb.* 611; *The Merchants' Bank of Brooklyn* agt. *Townsend*, 17 *How. Pr. R.* 569; *Truscott* agt. *Davis*, 4 *Barb.* 495; *Dowe* agt. *Schutt*, 2 *Denio*, 621.) The rule was also well settled in the late court of chancery. (*Holmes* agt. *Williams*, 10 *Paige*, 326; *Mitchell* agt. *Oakley*, 7 *Paige*, 68.) Also in the superior court. (*Clark* agt. *Sisson*, 4 *Denio*, 408.) It is the same in Connecticut (*Roe* agt. *Jerome*, 18 *Conn.* 138; *Middletown Bank* agt. *Jerome*, 18 *Conn.* 443), and perhaps in some other states. The estoppel, too, has often been held to be available against an indorser, as well as maker. The distinction marked by the referee, and on which he based his decision, has never been recognized in any reported case, nor is it sound in theory. There can be no reason why an indorser should not be estopped by his representation that the note is valid business paper, as well as the maker. The consequences to the purchaser are the same in both cases.

There is a question, however, not considered in any of the cases, which lies at the foundation of the rule apparently so well established in the supreme court. It is this, whether the doctrine of *estoppel in pais* should have application to the defense of usury. This question is worthy of consideration, and is still open in this court. Judge DENIO seems to have had it in mind when discussing the subject in *The Bank of Genesee* agt. *The Patchin Bank* (13 *N. Y.* 316). In speaking of the rule, he says: "This is carrying the principle of estoppel to the length of protecting a transaction prohibited by a positive law, founded upon considerations of public policy." He adds, "it is not necessary to affirm that doc-

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trine in this case;" hence he refrained from entering upon its examination. The point was commented on in *Ferguson* agt. *Hamilton* (35 Barb. 427), and suggestions were made, here unnecessary to repeat. On careful reflection and discussion, we are of the opinion that an *estoppel in pais* may urged against the defense of usury.

The same considerations of morality and public policy exist in that as in other cases where the doctrine of estoppel obtains. Nor should we, on other than grounds of absolute necessity, disturb a rule which has so long controlled the business affairs of the country, and been relied on as settled law.

The order appealed from must be affirmed, and the plaintiff is entitled to judgment absolute, pursuant to the stipulation given on the appeal.

All affirm.

N. Y. SUPERIOR COURT.

MARGARET IRVINE agt. AMASA SPRING and others.

No clerk of an attorney at law, however extensive his general powers may be, can *discontinue an action* without the consent of his principal.

Special Term, May, 1865.

Before Justice McCUNN.

MOTION by plaintiff to set aside an order entered for the discontinuance of this action.

Mr. CUTLER, *for the motion.*

Mr. NILES, *opposed.*

Mc CUNN, J. In this case it appears that a trial was had at circuit, on the 9th of November last, before a jury, and the plaintiff recovered a verdict of \$400; that before judgment was perfected, or costs taxed, Mr. Niles, the defendants' attor-

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ney, approached a person by the name of Walsh, who had at times acted as clerk in the office of plaintiff's attorney, and procured from him, unknown to the plaintiff's attorney, a consent to the effect that an order might be entered discontinuing the action on payment of \$400, the amount of the verdict, saying nothing of the costs. On this consent an order was accordingly entered discontinuing the action.

It is quite clear that no clerk, however extensive his general powers may be, can discontinue an action without the consent of his principal; indeed, the courts are so jealous of the interests of the different suitors that they will only allow an attorney to give a satisfaction piece within two years after entry of judgment, and that on receiving the full amount of the claim.

The person claiming to be the clerk of plaintiff's attorney, and who consented to the entry of the order of discontinuance, makes two affidavits on this motion, one for the plaintiff and one for the defendant; and as there was some slight contradiction in the affidavits, I ordered the appearance of Walsh in court and examined him, and then I learned that Mr. Niles handed \$55 to Walsh individually, in consideration that he, Walsh, should receive the certified check of \$400 for Mr. Cutler, and sign the consent to enter the order of discontinuance.

Under such a state of facts, I deem it my duty not only to set aside the order of the 20th of December unconditionally, but to deny the defendants' attorney's request for time to make a case.

Motion granted, with \$10 costs.

Bolles agt. Duff.

SUPREME COURT.

JESSE N. BOLLES, receiver, agt. JOHN A. DUFF and others.

It is a general rule of courts of equity that, when anything is due to a *mortgagee in possession*, he will not be deprived of such possession by any appointment of a *receiver*.

And particularly is this so when the mortgagee is responsible and is able to account for and pay any excess of rents and profits, after the payment of his debt, or will give security to do so.

But where it appears that the mortgagee is irresponsible, or that the rents and profits would be lost or would be in danger of loss, or that the mortgagee was committing waste upon or materially injuring the premises, a different rule would prevail, and a receiver would be appointed.

Where an interlocutory decree of a judge involves an adjudication that the mortgagee in possession, who is also appointed receiver, is entitled to remain in possession as such mortgagee until the coming in of a referee's report; although such adjudication would not prevent the court from removing him from his office of receiver, for proper cause shown, at any time before the coming in of such report, yet, if not as a matter *res adjudicata*, as matter of judicial decorum, it precludes his removal by any other judge of the court, for any cause existing *before such interlocutory order*, than the judge by whom such order was made

New York Special Term, November, 1867.

Before E. DARWIN SMITH, Justice.

MOTION upon order to show cause why the defendant Duff should not be removed as receiver, &c.

B. C. THAYER *and*

DAVID DUDLEY FIELD, *for plaintiff.*

BROWN, HALL & VANDERPOEL, *and*

JOHN GRAHAM, *for defendant.*

E. DARWIN SMITH, J. From the papers presented upon this motion, it appears that on the 29th day of June, 1866, an interlocutory decree was made in this cause by Justice POTTER, in and by which it was adjudged that the defendant Duff, at the time he acquired title and took possession of the premises in controversy in this action, was and is a mortgagee of said property, in possession, and was bound to account for the rents and profits received by him; and it was

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referred to a referee named in said decree to take and state an account between the said parties, from the 22d day of January, 1863, to the date of his report, and in which the defendant Duff be allowed the money paid by him for said property, with interest thereon, and all taxes, assessments, insurance, necessary and reasonable repairs, with interest, and the cost of and interest on all such improvements as have added permanent value to the property and have increased the rents and income thereof, and an allowance of \$1,000 per annum for his energy and efficient management of the property, and that said referee make annual rests, for the purpose of computing interest on the balance. The question of costs, and all other questions not expressly settled in said decree and in the conclusions of law and fact therein, were reserved until the coming in of the referee's report. In pursuance of this decree, the referee named therein proceeded to take and state the account of the defendant Duff, as therein directed, who had presented his accounts against the said property, in which he claimed a balance due him of about \$52,000 over all receipts from the rents and profits of the same.

It further appears that after said Duff had so rendered his accounts before said referee, and while the investigation of the same was going on before him, application was made to the court, upon affidavits asserting that the said defendant was overpaid, and that he had made false charges against the property, and was guilty of fraud and other misconduct in relation thereto, for the appointment of a receiver of the rents and profits of said property, and to remove the said Duff from all trust or control over the same.

This application came on to be heard at chambers, before Judge LEONARD, in July last, and was heard by him upon very voluminous affidavits and other papers, and finally resulted in a decision and an order, made on the 29th of July last, by the said judge, in and by which he appointed said Duff receiver of said property, and also further ordered that

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the plaintiff may have leave to apply to change the receiver for cause, on coming in of the referee's report, and that the receiver by this order appointed do make semi-annual reports of his proceedings, &c.

This motion to remove said receiver is the next proceeding in court in the cause, and is made before the coming in of the referee's report, and while the proceeding for the accounting is still pending before the said referee, and while an appeal is pending also from this order of Judge LEONARD appointing such receiver. It is apparent from the decree made by Judge POTTER, and this view is confirmed by letter from him, produced and read on the hearing, that he properly abstained from appointing a receiver in the action, among other reasons, on the ground that Duff was a mortgagee in possession, and was, as such, being abundantly responsible, entitled to remain in possession until his debt was paid. It is unquestionably, as a general rule, the settled doctrine of the courts of equity that when anything is due to a mortgagee in possession he will not be deprived of such possession by any appointment of a receiver. (*Edwards on Receivers*, 53; 1 *Hilliard on Mort.* 441; 13 *Vesey*, 377; 16 *Id.* 469; *Trentor agt. Woodruff*, 2 *Green*. 210.)

In *Rew agt. Moore* (2 *Jac. & Walker*, 552). Lord ELDON said: "Considering the question as between mortgagor and mortgagee, I do not know of any instance where a mortgagee in possession has said by answer that anything was due him, that the court has tried upon affidavits against the answer whether that was due or not. In *Brickford case* (*Janel's agt. Brickford*, 13 *Vesey*, 377), I said that if he would swear that sixpence was due, I would not appoint a receiver." In *Brewer agt. Sewell* (1 *Jac. & Wal.* 647), Lord ELDON also said: "I know no instance where the court has appointed a receiver against a mortgagee in possession, unless the parties making the application would pay him off according to his claims as stated by himself." And particularly is this so when the mortgagee is responsible and is

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able to account for and pay any excess of rents and profits after the payment of his debt, or will give security to do so. (*Patten* agt. *The Accessory Transit Co.*, 4 *Abb.* 237; 19 *Vesey*, 155; 8 *Paige*, 565; 2 *Green.* 214.) But if it appeared that the mortgagee was irresponsible, or that the rents and profits would be lost or would be in danger of loss, or that the mortgagee was committing waste upon or materially injuring the premises, a different rule would prevail, and a receiver would be appointed. (2 *Green.* 214; 15 *Eng. Law and Eq.* 133; 13 *Vesey*, 105; 16 *Id.* 59.) The power of the court in such case is, I think, undoubted, and the question is one addressed at all times to its sound judicial discretion, in view of the particular facts and circumstances of the case presented. In refusing to appoint a receiver on the application to Judge LEONARD, the learned judge acted doubtless upon the same principle, and that the court should not decide upon affidavits whether the mortgagee was paid, if he was responsible, as the order made by him, as above stated, expressly allowed a motion to be made, on the coming in of the referee's report, to remove the said receiver, *for cause*. The interlocutory decree made by Judge POTTER, and the said decision and order of Judge LEONARD, therefore, it seems to me, both involve an adjudication that Duff, as a mortgagee in possession, was and is entitled to remain in possession as such mortgagee until the coming in of the referee's report, and a direction to that effect. But this adjudication clearly would not preclude the court from removing him from his office of receiver, for proper cause shown, at any time before the coming in of such report; but it does, I think, if not as matter *res adjudicata*, as matter of judicial decorum, preclude his removal by any other judge of this court, for any cause existing before the order made by Judge LEONARD, on the 25th of July, 1867.

Under and by virtue of that order he became a receiver of this court, and is therefore clearly subject to its control, like any other receiver, and is removable for subsequent mis-

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conduct, neglect or breach of duty. Upon the facts appearing on this motion, I do not see that Mr. Duff has done any act in his capacity of receiver at all exceptional, since his appointment, in July last. The chief ground for his removal presented and urged on the argument of the motion was his giving a lease of the Olympic Theatre to Hayes, his son-in-law, for the rent of \$15,000 a year, when he was offered by Grover, the outgoing tenant, for the said premises, the sum of \$25,000, and might have secured that sum for the estate. The other allegations made on the argument of mismanagement of the estate, fraudulent charges before the referee, and other misconduct, all relate to facts confessedly well known, fully investigated, debated and considered before Judge LEONARD, and passed upon by him. The lease in question, it is clearly established, was executed by Duff and delivered to Hayes on or about the 20th of April last. The fact of its existence, and its terms, was, I think, well known at or before the hearing before Judge LEONARD, although there is some conflict in the affidavits on this point. The stenographer's notes of the argument of counsel on the hearing before Judge LEONARD, and what was said by the judge, I think conclusively settles this question. Judge LEONARD is reported at the close of the argument as saying, "The court did not like Mr. Duff's action in making a lease of the premises, without previously obtaining permission of the court. Therefore, while continuing Mr. Duff as receiver, the court would require that he give bonds in the sum of twenty-five thousand dollars for the faithful performance of his trust." One of the counsel for the plaintiff then said, "I suggest that the court increase the bond to \$50,000, inasmuch as he had heard that Mr. Duff was speculating in Wall street." The court accordingly so directed. When this lease was executed, Duff clearly had authority to give such lease. He was then acting as trustee, and had not been appointed receiver. As receiver, he was authorized to give a lease for one year. After his appointment, he did nothing,

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as receiver, in respect to such lease. It was an executed contract, and he could not revoke it. Hayes took possession under it, and for this act Duff is not responsible as for a new and affirmative act performed after his appointment as receiver. *If he rented the premises for \$10,000, or any sum, in fraud of the estate, less than he might by due diligence have obtained for the same, he is clearly responsible for the difference and loss, and it will be the duty of the referee, in taking the account, to charge him for such difference, and for all he might have obtained for such rent by due and proper care and diligence.* While, therefore, I think, from the facts appearing on this motion, that the giving of said lease by Duff to his son-in-law for \$15,000, when he was distinctly offered for the premises by the tenant then in possession the sum of \$25,000, was highly improper and unjustifiable, yet, as this was done before he was appointed receiver, and he is abundantly responsible to respond for the loss or injury to the estate for such misconduct, and he was appointed such receiver when the fact of the giving of such lease was well known to the parties and the court, I do not see upon what principle I shall be justified in removing him from such receivership. The remedy, if there be any, for this error, if it were an error, lies with the general term, upon the appeal pending. But I do not think Mr. Duff should be allowed to renew such lease, or make any new lease, or to make any permanent improvements or repairs of the premises, at the expense of the estate, without special leave of the court for that purpose. An order to that effect, I think, would be proper upon this motion, and the plaintiff may take such an order, if he thinks proper; otherwise the motion must be denied, with ten dollars costs to abide the event.

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COURT OF APPEALS.

FRANKLIN B. SEACORD, respondent, agt. CALEB MORGAN and
JOHN WARRIN, appellants.

Where a judgment of the court below on appeal is *affirmed* as to one defendant, and *reversed* as to the other defendant, not being *jointly* liable, the joint obligors who executed the *undertaking* given on the appeal for both defendants, are liable to pay the judgment of affirmance. It is a case of judgment affirmed in part and reversed in part. (*Affirming*, S. C. 17 How. 394, and *Gardner agt. Barney*, 24 How. 467.)

September Term, 1867.

IN the year 1850, the plaintiff in this action commenced a suit in the supreme court of this state against Nicholas Miller and Leonard P. Miller. The plaintiff claimed to recover upon a promissory note made by Nicholas Miller, and indorsed by Leonard P. Miller. The maker and indorser, though not jointly liable, were, in pursuance of the provisions of our statute, united as defendants in the same action. Such proceedings were had in the supreme court, that on 20th day of April, 1853, the plaintiff herein recovered judgment against said Nicholas Miller and Leonard P. Miller, defendants, for the sum of \$261.54.

The defendants in that action appealed from said judgment to this court, and thereupon the defendants in this action, for the purpose of making said appeal effectual, and in compliance with the provisions of the Code, made and executed to the plaintiff in this action an undertaking, in the usual form, with a condition therein, in these words: "Now, therefore, we, John Warrin and Caleb Morgan, do hereby, pursuant to the statute in such case made and provided, undertake that the said appellants will pay all costs and damages which may be awarded against them on said appeal, not exceeding two hundred and fifty dollars; and do also undertake, that if the said judgment so appealed from, or any part thereof, be affirmed, the said appellants will pay the amount

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directed to be paid by said judgment, or the part of such amount as to which the said judgment shall be affirmed, if it be affirmed only in part, and all damages which shall be awarded against said appellants on the said appeal."

Upon such appeal, this court affirmed the judgment of the supreme court against Nicholas Miller, the maker of said promissory note, and reversed the judgment of the supreme court against said Leonard P. Miller, indorser of said note, and judgment was rendered in his favor. (*Seacord agt. Miller*, 3 *Kern*. 55.)

The plaintiff now brings an action upon said undertaking, and avers that the said judgment mentioned in said undertaking was affirmed as to the said appellant Nicholas Miller, with costs, and reversed as to the said appellant Leonard P. Miller. That judgment had been perfected in said supreme court, upon the judgment of said court of appeals, and that an execution had been issued for the amount thereof against the property of said Nicholas Miller, and that the same had been duly demanded of said Nicholas Miller, and that the defendants had notice thereof. The defendants denied all the matter set forth in the complaint, and the action was referred to William Kent, as referee, who found all the facts, as stated and set forth in the complaint; also, that the amount of said judgment against said Nicholas Miller was \$479.42, besides interest; and that the same had not been paid, nor any part thereof, but that the same remained unpaid, and entirely unsatisfied; and found, as conclusions of law, that the undertaking was a valid obligation; that the judgment entered against the said Nicholas Miller in the supreme court, on filing the remittitur from the court of appeals, was duly entered against him, affirming the said judgment so appealed from, and that by the affirmance of the judgment against Nicholas Miller, and the facts in said report contained, the defendants became bound and indebted to the said plaintiff for the amount of said judgment, and the interest thereon. Judgment was accordingly entered for the said plaintiff, and

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on appeal the same was affirmed at general term (*Reported* 17 *How. Pr. R.* 394), and the defendants now appeal to this court.

WM. H. TAGGARD, *for appellants.*

S. E. LYONS, *for respondent.*

DAVIES, Ch. J. The only question of a serious nature urged upon us for a reversal of this judgment is, that as it appears affirmatively that the judgment appealed from was against two defendants, and as it was affirmed only as to one defendant, and reversed as to the other, the event or contingency upon which these defendants agreed and undertook to pay the judgment appealed from, has never happened. They undertook, that if the judgment so appealed from be affirmed, then the appellants would pay the amount directed to be paid by the said judgment, and all damage which might be awarded against the said appellants on the said appeal.

The defendants contended that the judgment so appealed from has not been affirmed.

There is some plausibility, it must be confessed, in this position, and it has been sustained by a very ingenious and able argument by the counsel for the appellants, and were it an open question in this court, it would be proper to proceed with the discussion of the views suggested.

But as we understand, the precise question now presented was considered and passed upon by this court in the case of *Gardner agt. Barney and Butler*, decided here in December, 1863—not reported. That was an action upon an undertaking given by the defendants, on an appeal from a judgment of the special term to the general term of the supreme court, taken by the defendants Ogden and Smith. The judgment of the special term was against both defendants, and the appeal was from that judgment by them to the general term. And the undertaking was similar in form to that given by these defendants. The general term of the third district

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reversed the judgment, and ordered a new trial. From this order the plaintiff Gardner appealed to this court, and this court reversed the order of the general term, granting a new trial, so far as it related to the defendant Smith, and affirmed the judgment of the special term as to him, with costs. It also affirmed the order granting a new trial as to the defendant Ogden, and gave judgment in his favor against the plaintiff, with costs. (*Gardner agt. Ogden*, 22 N. Y. R. 327.)

The action in this court above referred to, against Barney and Butler, was upon the undertaking given on the appeal taken by Ogden and Smith from the judgment against them at special term to the general term. (*The opinion of the Supreme Court at general term is reported 24 How. Pr. R. 467.*) And the question as stated by DENIO, Ch. J., in the opinion of this court, whether the affirmance of the judgment as to one of the defendants, who were together adjudged to pay a sum of money in the original action, renders the defendants liable as sureties upon the undertaking.

That question is very carefully and fully discussed by the learned chief judge. And as his views upon this point have never been reported, and are so conclusive upon the point under discussion, and received on that occasion the approval of this court, it is not deemed inappropriate to quote them. Nothing further need be added upon the subject.

Judge DENIO said: "The expressions of the undertaking, which provide for the case upon affirmance, only in part, appear to have reference primarily to the amount, and not to the number of persons charged. The language is, that the appellants, in the case of a partial affirmance, will pay the amount directed to be paid by the judgment, or *the part of such amount* as to which it shall be affirmed, if it be affirmed only in part. But independent of these words, I am still of opinion that this judgment has been affirmed, according to the general sense of the instrument.

"The decision that the plaintiff is entitled to the amount of money adjudged to him by the special term, is sustained

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and the position is upheld, that he is entitled to recover it in action. It was a case in which several damages might be given against one of the defendants, though the other should be acquitted. This is established by a judgment, affirming the recovery as to Smith alone. The judgment of the special term has, therefore, been affirmed, with a variation, however, in this—that the recovery is to be satisfied by one, and not by both of the defendants. It is not necessary to depart from the language of the instrument in order to charge the sureties. They are to abide according to the terms of their undertaking.

“There has been an affirmance of the judgment appealed from, and equitable construction cannot be resorted to for the purpose of charging sureties. But if the case is within the letter of their contract, they are liable, unless there is something in the spirit and intention of the instrument, or of the law under which it is given, which exonerates them. The object of the undertaking is to procure an absolute stay of execution, and of all proceedings on the judgment, and such is its effect. (*Code*, §§ 335, 339).

“The motive for requiring the undertaking was to secure to the plaintiff the fruits of the recovery, in case it should be determined that the allegations of error were unfounded. As the plaintiff is, by the stay of execution, deprived of the immediate resort to the property of the judgment-debtor, which the law would otherwise give him, and as his title to the amount adjudged in his favor is *prima facie* established, it was the policy of the law that he should have security to indemnify him against the possible contingency of the delay. The law assumes the judgment to be such presumptive evidence of his right, that it will not subject him to the hazard arising from the delay of further litigation, without an indemnity against any loss which he might thereby incur. If it should be decided, that in order to hold the sureties the judgment should be affirmed in all its parts, without variation

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or modification, the provisions for security would be illusory in a great variety of cases, which may be supposed.

“Let us take the case of an equity suit against two defendants, and a judgment in a primary court against one, and an acquittal of the other, and cross-appeals by the plaintiff as to the discharge of the one acquitted, and by the defendant, who was held liable; and that the appellate court should hold that both were liable, and give judgment accordingly. It is plain that the sureties of the defendant, who was held liable by the first judgment, ought not to be discharged, for the complaint of that defendant against the judgment would be shown to be unfounded, and the plaintiff would have incurred the hazard against which the undertaking was intended to protect him; and yet it could not be said that the identical judgment appealed from had been affirmed in every particular. The system of the provisions respecting security on appeals is explained by the 366th section of the Code, as to judgments directing the assignment or delivery of documents or personal property. The undertaking in that case was to the effect, that the appellant would obey the order of the appellate court, on the appeal. This shows the general intention of the legislature, that the judgment of the primary court should not be delayed in its execution, unless the party charged should give security to abide the judgment of the superior court, if it should be adverse to him, without requiring that the same identical judgment should be sustained.

“The nature of the original action, and the liabilities upon which the recovery was had, are not stated in the present case. We may suppose them to have been what we know, by looking into the former case, they were—an alleged breach of duty on the part of defendant Ogden, as member of the firm, who were the agents of the plaintiff for the sale of his land, in disposing of it in bad faith, and for a less price than it was worth, the defendant Smith being the buyer, under such circumstances as would estop him of the defense of a *bona fide* purchaser. Both the defendants were held liable

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for the supposed value of the land ; and although the judgment was joint in form, each was made liable on account of his supposed individual misconduct, and not on account of the delinquency of the other. It was more like a judgment against two tortfeasors than one against joint-debtors. In such cases the appeal is, in effect, several, by each defendant ; and it would have been perfectly correct for each defendant to have brought a separate appeal, and to have given a separate undertaking, though it was not irregular for them to join in the appeal, and procure a single undertaking. But the proper construction of the instrument is, that the sureties undertake for each of the defendants. The defendant Smith was made liable for the value of the land, on account of having purchased it at a voidable sale, under circumstances which would not enable him to hold it against the plaintiff's equity ; and Ogden was held liable to the same amount for having sold the land to Smith, in violation of his duty ; and the judgment contained a provision that Smith might satisfy the amount by reconveying such part of the land as he had not disposed of to others, and assigning and paying to the plaintiff the securities and money which he had received for the part sold by him. Now, it might very well be that the judgment could be sustained against one, while the other should be acquitted, and such was, in fact, the judgment of this court, which was in favor of Ogden, on the ground that he, being absent from the country, had no personal concern with the alleged illegal purchase from the plaintiff. The appeal taken under such circumstances was, in effect, several, by each defendant, and the undertaking should be construed in connection with the judgment. Viewed in that light, the sureties must be considered as undertaking, in behalf of Smith, that if the judgment against him, from which he had appealed, be affirmed, he should pay the amount adjudged ; and so of the defendant Ogden. If the sureties were bound separately for each defendant, in respect to the judgment against each, as I think, they were, it

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is of no consequence that there was a reversal as to one of them. The terms of the contract adjust themselves to the case as it actually existed; and it is the same thing as though each had appeared separately, and the sureties had signed a separate undertaking upon each appeal. Though the nature of the action in the original suit, and the grounds of the judgment, were not found on that under review, neither was it shown that the judgment was one against joint-debtors; and the condition annexed to it, allowing Smith to discharge it by a collateral act, shows that it was not an ordinary judgment against two persons jointly indebted. I am therefore of opinion, that the objection, that the judgment has not been wholly affirmed, or affirmed as to both defendants, is not well taken."

These are the views of this court, so clearly expressed in a case so analogous to the present, that they must be regarded as controlling and not open to further discussion. It is impossible to point out any essential difference between the case under review and that in which the preceding opinion was rendered. If ever a case was in *quatuor pedibus* with another, this is with that. To the same effect is the case of *Potter agt. Van Vranken* (36 N. Y. R. 619).

In the record now before us it distinctly appears that the original judgment was not against the defendants therein as joint-debtors, but a judgment against them upon the separate liability and contract of each. It was against Nicholas Miller, as maker of the promissory note in suit, and against Leonard P. Miller as the indorser thereof; and, as was observed in *Gardner agt. Barney*, it might very well be that, under such circumstances, the judgment might well be sustained against one defendant, while the judgment against the other would not be allowed to stand.

Then the appeal, in effect, was in this case, as in that, a several appeal by each defendant; and we are to construe the undertaking to refer to the character of the judgment it was given to secure. In that light we must hold that the

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sureties are to be regarded as undertaking, on behalf of Nicholas Miller, that if the judgment against him, from which he had appealed, should be affirmed, he would pay the amount of the judgment; and the same as to the other defendant. Now, the judgment against the defendant Nicholas Miller, was affirmed by this court, and upon such affirmance, the liability of his sureties to pay the judgment so affirmed, became absolute. It was not impaired by the circumstance that this court reversed the judgment of the supreme court against the other defendant, Leonard P. Miller. It is not denied that if each defendant had taken a separate appeal to this court from the judgment against him, and an undertaking had been executed upon each appeal, that in case of the affirmance of the judgment upon either appeal, the sureties in respect thereto would have become fixed, although the judgment on the other appeal had been reversed. We held in *Gardner agt. Barney*, that in a case like the present, it is the same thing as though each defendant had appealed separately, and the sureties had signed a separate undertaking upon each appeal. That is decisive of the case at bar.

The findings of the referee, that the remittitur from this court, containing the affirmance of the judgment, was filed in the supreme court by its order, is conclusive of the facts, and of the regularity of the plaintiff's proceedings. We have no doubt of the power of the supreme court to direct the order to be entered, making the judgment of this court the judgment of that court, *nunc pro tunc*. (*Chautauqua County Bank agt. White*, 23 N. Y. R. 347.)

The judgment appealed from should be affirmed, with costs.

Concurring, PORTER, PARKER, WRIGHT and GROVER, JJ.
Affirmed.

Tolano agt. National Steam Navigation Co.

N. Y. SUPERIOR COURT.

FRANCES TOLANO, respondent, agt. THE NATIONAL STEAM
NAVIGATION COMPANY, appellants.

An action of *trover* will not lie for the omission of a *common carrier* to deliver property, as where the property has been stolen or lost through negligence, and so cannot be delivered to the owner. The remedy is *assumpsit* or a *special action on the case*. (McCUNN, J., *dissenting*: *Holding that section 69 of the Code has abolished all distinctions between the mere forms of actions, and every action is now a special action on the case.*)

General Term, January, 1868.

APPEAL from a judgment and order denying a new trial.

MR. MORRISON, *for plaintiff.*

MR. VAN COTT, *for defendants.*

ROBERTSON, Ch. J. The cause of action set out in the complaint in this case, is a wrongful conversion by the defendants of, and a refusal by them to deliver to the plaintiff, on a demand by her, a trunk (her property) "containing plate and other valuable articles, and money." Were it not that evidence seems to have been admitted without objection of the value of such *contents*, and the case to have been tried upon the assumption that the action was brought for *their* conversion also, it might be doubtful whether *they* could be recovered for under a complaint so worded.

Under the allegation in the complaint of the "conversion" of the property in question by the defendants, to their own use, whether as bailees for hire, or only gratuitous custodians of it, the plaintiff could not recover without proof of an absolute appropriation of it by the defendants to their own use, or what is equivalent, parting with it to others without the authority of the owners. Only in such cases would an action in the form of *trover* have formerly lain, even against common carriers. (*Devereaux agt. Barclay*, 2 Barn. and

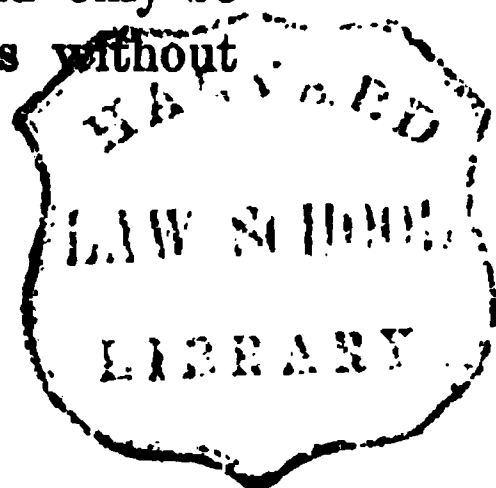
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Ald. 702; *Stephens* agt. *Hart*, 4 *Bing.* 476; *Youl* agt. *Harbottle*, *Peak Cor.* 49; *Sublock* agt. *Inglis*, 1 *Stark.* 154.)

In a case where a common carrier might have been sought to be made liable, on non-delivery, a special action on the case in a breach of the public duty of carrying safely or of *assumpsit* for a breach of the undertaking so to carry, would have been the only forms of remedy for a mere negligent loss. (*Ross* agt. *Johnson*, 5 *Burr*, 2825; *Aren*, 2 *Salk.* 665.)

This constitutes a substantial difference in the cause of action, which the plaintiff was bound to observe in the statement of facts constituting the complaint (*Code of Procedure*, § 142, *sub.* 2) if she seek to recover for mere non-delivery or loss. This in fact the plaintiff conceded, claiming on the argument, however, that such appropriation, in fact, by the defendants, was established by the evidence.

No question is made as to the termination by the compulsory transfer of the plaintiff to the receiving or hospital-ship, Illinois, under the health laws of this state, of the original contract of the defendants, as common carriers, to transport the plaintiff and her baggage to the port of New York, and safely land it and her there; the plaintiff's counsel, not only conceding that it was so terminated, but even claiming that the defendants never had, even during the voyage, the missing property under their charge as carriers, and that they took it from her by compulsion, and against her will, into their custody, and kept it in such a manner that it could not have been lost or stolen, and must, therefore, have been appropriated by them to their own use. A mere compulsory taking of the property from the plaintiff's possession by the defendants, and a refusal to restore it, would have been sufficient without any proof of its subsequent fate, or of a demand to enable her to recover in this action. Proof of want of ordinary care in keeping it, or of actual subsequent appropriation of it to the use of the defendants, would only be necessary in case they had been voluntary bailees without hire.



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On the trial, the counsel for the defendants requested the court to charge the jury that they "must find a verdict for the defendants if they found that they did not convert the property in question to their own use," which the learned judge presiding on the trial refused to do, except as he had already charged, to which refusal such counsel excepted.

The learned judge has charged that "the principles applicable to all cases of property lost by carriers are equally applicable to this case, and must be applied with the same rigor as in all others. There is nothing that calls for any relaxation of the rules in this case." And he added: "In my view of the case under the evidence, these defendants are liable for the loss of this trunk. As to the liability for the contents, that is another thing. There is no question at all but that there was such a trunk, and it may be fairly assumed that the trunk was lost." He then submitted to the jury substantially three questions of fact: (1.) What were the contents of such trunk. (2.) Whether the articles of wearing apparel and jewelry claimed by the plaintiff to have been in said trunk when lost were her ordinary and necessary wearing apparel for the voyage; and (3,) whether the sum of \$1,200, claimed by her to have been in such trunk when lost, was a reasonable amount of money "for traveling expenses and for staying a few days at a hotel until she could get into business," and instructed them that if they decided the last two questions in favor of the defendants, they should "give her a verdict" for such articles as were in the trunk, except certain ones which he had directed them to disregard as not being necessary either as wearing apparel or for traveling expenses.

The court thus not only evidently put the liability of the defendants upon the ground of their being common carriers, liable at all events for the loss of the property in question upon its non-delivery, and not exempt from liability by proof of any ordinary legally recognized excuse for not delivering at the end of the route, but also refused to charge that

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the defendants were not liable unless for a conversion of the property to their own use. This is directly contrary to the principle settled by the authorities already referred to (*vide supra*), and was sufficient error to authorize the granting of a new trial. The plaintiff's counsel seems, however, to have conceded this, and devoted himself to the task of proving that there was sufficient evidence in the case to establish such conversion; either by the compulsory taking of such property out of the plaintiff's possession; or if such taking were peaceable and lawful, by the impossibility or violent improbability of its disappearance in any other way under all the circumstances of the case. And as it may be necessary, in case of another trial of this case, to determine what rules of law are applicable under that view, it may be well to look at the evidence. It was not only conceded on the argument, but claimed by the plaintiff's counsel, "that the defendants at no time, as carriers or in any other way, by contract with, or privity or consent of the plaintiff, had charge of the property." This may be assumed to be true up to the time of her leaving the Illinois to go on shore, for both the plaintiff and another witness (Mrs. Young) testify to that effect. The former states that she had had charge of that box during the passage in her "berth," because there were valuable things in it, and "she never allowed it to go out of 'her' possession on board the Helvetia or the Illinois until it was put on the tug-boat;" and again, that this was the only package in her charge. She had no other but that in her charge. She further testified that she had it three weeks in her room on the Illinois. The other witness corroborated her statement as to having it in her charge in her berth during the whole voyage on board of the Helvetia. And the assumption of that care by the plaintiff would have prevented any recovery by her for any loss of any such box during the voyage. (*Cohen agt. Frank, 2 Duer, 335*).

The first question, therefore, on the evidence, is as to the compulsory taking of such property by the defendants out of the possession of the plaintiff. In applying the evidence

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to that point, it is to be assumed that all previous relations between the parties had ceased, and that they stood precisely as if for the first time, the plaintiff being a lodger on board of the Illinois, had parted with the possession of her trunk at the moment of her leaving that vessel to go on shore. The testimony of the plaintiff was, that when the tugboat came alongside, and she was directed to go on board of it to go ashore, her son and herself took such trunk and its contents "to the gangway to bring with them." Mr. Finlay (the alleged agent of the company) said they could not bring their baggage on that boat; it must go on the other tugboat. "They then carried it across to the side to the other tugboat, and it was put on board." They then went ashore on the first boat. This was all done under Mr. Finlay's direction. On cross-examination, she stated that he "said he would not allow any package to be on board where the passengers were." This was corroborated by Mrs. Young and the son of the plaintiff (James Tolano). The latter also testifies that Mr. Finlay, who was acting then as agent of the defendants, receiving and delivering letters, bringing down provisions and the like, came down with two tugs to bring the passengers and baggage on shore. The fact of Finlay's acting as such agent was also testified to by another witness (Gamble), who further states that Finlay brought all the baggage on one tug and carried the passengers to land on another. After towing the Illinois to her winter quarters by such boats, he removed the passengers on one boat and the baggage on another. He ordered no baggage or package to be taken by the passengers. This was when all were leaving the Illinois to land. He would not permit any of the passengers to have or keep their baggage under their own charge, when landing from the Helvetia. "He prevented them from taking their baggage with them." It was admitted on the trial "that the defendants employed the tugboats to land the passengers and their baggage." This evidence was not essentially varied by any other testi

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mony, except that Mr. Finlay testified that he told the passengers that they had to go on the passenger tugboat, and the baggage must go by the other tug, but that any small parcels or valuables he would allow them to take with them; and in this he was corroborated by two other witnesses (Rourke and Peterson). This testimony is apparently not contradicted by any other. The box itself was three feet long and one foot six inches broad. Mr. Finlay also testified that he had the superintendence of the landing of the passengers and baggage from the *Helvetia*. He took down two boats, one for the passengers, and the other baggage. He had orders from the quarantine commissioners to have the *Illinois* brought to Gravesend Bay, and there disembark the passengers and the baggage. He wanted to get the passengers to Castle Garden before it was closed, that they might be taken care of during the night. He superintended the transfer of the passengers, and another person (Peterson) had charge of the men that moved the baggage, which he landed on the wharf at Castle Garden and put in an inclosed space.

I am unable to discover in the evidence any forcible dispossession of the plaintiff of such trunk, or any compulsion of her to place it on board of the baggage boat. She was undoubtedly prevented from taking it with her in the passenger boat, but that alone would not have compelled her to put it into the custody of the agents of the defendants, on board of the other boat. She might, for aught that appears to the contrary, have left it on board of the *Illinois*, and taken another opportunity to land with it in her possession, unless the removal of herself and her baggage, as well as the other passengers, was by authority of the quarantine commissioners, and therefore peremptory, under which, indeed, rather than that of the defendants, Finlay seems to have been acting, as the agent of such public officers. His separation of the passengers from the baggage may have been discreet to prevent any delay in waiting for the latter, which might interfere with such passengers being landed and housed in

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Castle Garden that night. Passengers were notified they might take small packages of valuables, and it does not appear that the plaintiff claimed the trunk to be such. It appears to have been a box of dubious size for holding valuables (unless they were very numerous); at all events the plaintiff, without the least remonstrance, although it contained a great deal of money and valuables, as she stated, and she had it in her berth under her eye the whole voyage, carried it herself to the side of the other tugboat and saw it put on board. No part of this evidence seems to me to be such an assumption of exclusive dominion or control over such box by Finlay, as agent of the defendants, as to make the act of receiving it on board of the baggage boat a conversion by them. If it contained any evidence of it, it should have been submitted to the jury.

But if such delivery was a voluntary bailment without hire, the question of want of ordinary diligence in taking care of the box should have been submitted to the jury, if there was any evidence of it. It seems by the testimony that after being placed on board of the tugboat (the Fletcher), all the baggage was landed as before mentioned, and left in charge of a watchman (Hartman) all night in an inclosure. All of it brought from the Illinois was there next morning, and was again in charge of a watchman (Peterson) all that day, until he was relieved by the previous watchman (Hartman), who remained until the second morning on guard, when the landing agent (Hall) came, who commenced delivering it, after an examination by custom house officers, the plaintiff being present. Such watchman denied the removal of any of the baggage until that time, and the plaintiff's counsel admitted on the argument that such trunk was "so sedulously kept by the vigilance of its custodian that it could not be stolen or abstracted." Nor do I find any evidence of the want of the ordinary precautions taken by prudent men to take care of their property. If there was, it should have

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been submitted to the jury, unless downright negligence was proved.

I am not prepared to admit that, upon strong proof of great care of a bailee without hire, in guarding chattels delivered to him, so as almost to exclude the possibility of their disappearance without his connivance, a conversion to his use is to be presumed, or that it is by itself alone sufficient to go to a jury upon this point. At most, it can only be a circumstance to be submitted to the jury, either alone or with others.

Upon either view of the case, therefore, either that of the court, considering the defendants as common carriers, and liable as such, without an appropriation of the property to their use, or that of the plaintiff's counsel, considering the defendants either as *tort feasers*, in taking or afterwards appropriating the goods, or guilty of negligence in taking care of them, there should be a new trial.

The judgment and order denying a new trial must therefore be reversed, and such new trial had, with costs to abide the event.

McCUNN, J. (*dissenting.*) I regret that I must dissent from some of the views set forth in the leading opinion of the court.

The action is to recover \$2,892.50, being the value of a small trunk and contents, which the plaintiff alleges the defendants wrongfully took and converted to their own use. The facts are substantially as follows: The plaintiff was a passenger in one of the defendants' steamships (the *Helvetia*) from Liverpool to this port. On the arrival of the vessel here, it was found necessary to quarantine her, under our laws; consequently the passengers were sent, with all their luggage, to the steamship *Illinois*, then moored in the lower bay. At the expiration of some eighteen or twenty days, and after quarantine was perfected, the defendants sent their steamtugs and brought the passengers and their baggage to

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the city. The plaintiff had the small trunk, the one out of which this controversy arose, in her possession, and was guarding it herself, as she had done all the voyage. The defendants took the trunk from her against her will, and placed her in one tug, and her property, together with this trunk, on another, to send them to this city. This was the last she saw of her trunk, or the articles it contained. She demanded her property; the demand was refused. Hence this action.

The complaint does not declare against the defendants as carriers, but simply against them for unlawfully taking and converting the property; and I hold that, under the circumstances, this is the proper form of pleading.

The defendants answer that they are carriers for hire, but urge, against a recovery, that an action of trover will not lie for the mere omission of the carrier to deliver, as where the property has been stolen or lost through negligence, and so cannot be delivered to the owner. The remedy, their counsel says, in such case, is assumpsit, or a special action on the case, and not trover, as he alleges this action is. Now, the 69th section of the Code has abolished all distinctions between the mere forms of actions, and every action is now a special action on the case. (*Goulet agt. Asseler*, 22 N. Y. R. 228.) The Code (§ 142) requires only a plain and concise statement of the facts constituting a cause of action, without repetition, and a demand for the requisite relief. Now, this complaint states concisely and clearly that her property was taken from her possession without her consent, and that, although she demanded a return of the same, yet it has not been returned, and she asks that the court award her its value. You may designate the action as an action in trover, or in assumpsit, or one on the case, or whatever else you may please to call it. I hold that nothing more is requisite in the complaint, and although some may cling to old and obsolete forms of pleading, yet to the plain mind (I

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mean those who seek speedy and substantial justice), and according to the law of the day, this is all that is required.

The learned counsel for the defense, in his effort to establish in the mind of the court that the form of action in this case should have been assumpsit, and not trover, cites a synopsis of the case of *Ross agt. Johnson*, to be found in the fifth volume of *Abbott's Digest*, page 243, forgetting this fact, that that authority is a century old, and that we have changed much in the forms of law pleading since then, as well as in all things else. But even in the case of *Ross agt. Johnson*, which I find reported at length in the second volume of Lord MANSFIELD's decisions, by *Evans*, that most learned judge declares his disapprobation of nonsuits founded upon objections that have no relation to the merits of the action.

Moreover, Lord MANSFIELD said in that very litigation that the form of the suit should have been an action on the case, which form of action the suit at bar is; and I hold, therefore, that the authority of *Ross agt. Johnson* is an authority for the plaintiff. The action herein is not brought specially against the defendants as carriers. The complaint is simply for the taking and conversion of the plaintiff's property, facts which, without reference to form, in themselves constitute a substantial cause of action; and I hold that the court, under such a complaint, taking it in connection with the answer and the proofs in the case, would be justified, without alleging they were carriers, in holding them responsible.

Let us examine briefly what one of the best elementary writers says as to the form of pleading adopted in the complaint. *Hilliard, on Remedies for Torts*, writing in 1867, says: "In trover against carriers, the declaration need not set forth the duty of the defendants as carriers, if it sets forth his negligence and loss;" and this rule was held in the case of *Wright agt. McKee* (37 *Verm.* 161), and was also applied in the case of *Crouch agt. The London, &c.* (14 *Eng. Law and Eq.* 498), and these authorities are gleaned from reports

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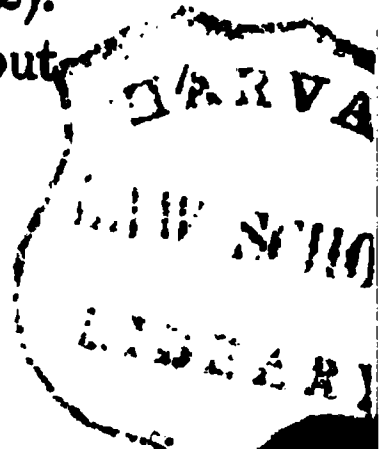
adopted by states where a much stricter line of pleading is applied than in our state since our Code took effect; and I certainly can find no authority wherein this liberal rule is condemned.

The only exception that can be taken to the proceedings had before the judge below is, that in his charge he discussed at some length the law of carriers. Now, while such a discussion could perhaps have been dispensed with, has the course pursued by that learned judge in this respect injured the defendant's case? It certainly has not, and the best evidence of his not injuring defendant's position before the jury in his charge is the fact that not a single exception to that charge was taken. Indeed, the answer, and the whole theory of the defense, was that the defendants were carriers, and were not answerable as such for this special property, and it was only at the request of the defendants' counsel that the court applied the law of carriers at all; so that it would be unjust to have this court apply that rule to the plaintiff in the argument here, when it is clearly seen that the plaintiff's counsel protested against its application throughout at the trial below. Nor can the defendants request the court, at the trial of the issues of fact, to apply a rule of law in their favor against the will of the plaintiff, and then in the appellate court, if that rule is improperly applied, take advantage of its improper application here. But this the defendants' counsel does not seek. In his brief he intimates that the complaint is broad enough to hold the defendants as carriers, and in his answer he relies upon his clients' rights as such carriers; and on the trial at circuit he requested that the rule of law relating to carriers should be strictly applied by the court, and argued that defendants should not be held liable for money or valuables which they did not, in their agreement with plaintiff, as carriers, undertake to protect or forward. And the learned judge did apply the rule as requested, and that in the strictest sense of the word; for he charged the jury that plaintiff could only recover for neces-

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sary wearing apparel, and that if she had more money in the trunk than enough for traveling expenses, she could not recover the money over. If the complaint had been specially drawn so as to enable the plaintiff to recover against defendants as carriers, the case could not have been more fully developed on the trial below than it has been. The plaintiff simply declared for taking and converting property. The defendants answer, "We are carriers for hire between this port and Liverpool. We did agree to carry you and a certain quantity of baggage to New York; but you had property and money in that trunk of which you concealed from us a knowledge, and which, under the laws of this state, we, as carriers, are not responsible for, and therefore you cannot recover." Now, as I have stated before, the learned judge allowed this theory of the defense to go to the jury, and charged the law of carriers correctly, and that in favor of the defendants; and he submitted the question of necessary wearing apparel, and the proper amount of money for traveling expenses, to the jury. It will be said, however, that under the complaint (the complaint being for taking and converting) final judgment cannot be granted. There are two answers to this proposition. First, the complaint is broad enough to hold the defendants as carriers, because it was optional with the plaintiff to treat the defendants as common carriers and sue in case for breach of duty, or to ignore their character as carriers and sue for conversion. She has chosen the latter, and the action lies. Second, if not broad enough, the 173d section of the Code allows the court—I mean the appellate court—and that of its own motion, when it serves the ends of substantial justice, to make the pleadings conform to the facts proved on the trial.

The court of appeals applied this rule in the case of *Pratt* agt. *Hudson River Railroad Company* (21 N. Y. R. 305), and the general term of the supreme court allowed a similar amendment in the case of *Clark* agt. *Dales* (20 Barb. 42). Not only was this sound rule adopted in the above cases, but



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it was strictly applied in all of the following cases: *Coleman* agt. *Plaisted*, 36 *Barb.* 272; *Bowdin* agt. *Coleman*, 3 *Abb.* 431; *Harrower* agt. *Heath*, 19 *Barb.* 331; *Cady* agt. *Allen*, 22 *Barb.* 388; *Bates* agt. *Graham*, 1 *Kernan*, 237. This doctrine was also established in this court in the case of *Foot* agt. *Roberts*, decided at a late general term. In that case Mr. Justice MONELL, in a very clear opinion, establishes beyond a doubt that the court has a right, in all cases where it serves the ends of substantial justice, to make the pleadings conform to the proofs.

It was "in furtherance of justice," as the statute declares, that such a section was added to the Code; I mean the section enabling the appellate court to make such amendments. And surely a case never arose, and never can arise, wherein the statute can be applied and the ends of justice better subserved, than in this case. Let me ask, "What is the amendment, if any, required here?" Why, it simply requires the words "as carriers" to be added after the word "defendant," on line three of folio four of the complaint. It is conceded that, in whatever light we may view this case, all the facts were fully developed on the trial, so as to enable the court to say whether the defendants shall be held liable as carriers, or for taking and converting, and there end the litigation. The learned judge below allowed the defendants and the plaintiff to place all the facts in the case in the fullest light before the jury, and allowed the jury to pass upon those facts; and if there were a thousand trials had hereafter, matters touching the property in controversy could not be made plainer. If this be so, why should the parties be subjected to a new trial, perhaps to a long and exceedingly expensive litigation, when this court sitting here in *banc* can apply a remedy?

Section 173 of the Code, relating to such amendments, was designed, among other things, to shorten litigation, to put an end to suits; and the courts, in all cases where the rule can be applied, should apply it strictly. I think, how-

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ever, that the views set forth in the first branch of this opinion are the correct views, and that the complaint, as it stands, is broad enough, and justifies the verdict of the jury. It is of little consequence whether the defendants took the property as carriers or as individuals; it is enough to sustain the action that they took the property.

What is the object of plain pleading? Why, it is to prevent, among other things, several actions from being brought for the same cause; and when the cause of action is so plainly stated that the facts can be developed at the trial and passed upon in such a form as to end the litigation and prevent new suits for the same cause, this is all that is required, and no one will contend for a moment, after having examined the pleadings in this case, and after so full a development of the facts and circumstances on the trial below, that another action of any kind, especially an action against the defendants as carriers, could be maintained.

I have had no opportunity of consulting with my associate justices, who heard the case (the papers having been submitted to me). Perhaps a discussion of the law and facts by them in my presence, or a knowledge of their views, might have induced me to concur with them about the application of the rules of law; but in the absence of such knowledge, and entertaining the views of the law applicable to such cases I now entertain, I am for affirming the judgment, with costs.

DIGEST

OF THE

POINTS OF PRACTICE,

AND

OTHER IMPORTANT QUESTIONS,

CONTAINED IN THE FOLLOWING REPORTS:

35 *Howard's Pr. R.*; 49 *Barbour's R.*; 3 *Abbott, N. S.*; 37 *N. Y. R.*; and 3 *Robertson's R.*

ABATEMENT.

1. Where an action is commenced by service of process upon only one of several defendants jointly indebted, and the defendant served dies before judgment, and before the others are brought in, an order to continue the action against the personal representatives of the deceased defendant is not proper. The action should be continued against the other defendants. (*Fine* agt. *Righter*, 3 *Abb. N. S.* 385.)

ACCORD AND SATISFACTION:

1. So far as a release from the continuing obligation of a specialty, or its modification, and the satisfaction of a liability incurred under past breaches, are concerned, a distinction is observed between the modes of so releasing, modifying and satisfying them. An instrument of equal solemnity, unless in case

of performance, is necessary to discharge the first, or modify it, except as to time of performance, and then only by way of estoppel; so that an acceptance by parol, neither of an executory agreement nor a chose in action, in consideration of a parol contract to modify or discharge it, will operate as such modification or discharge, even although such new agreement be subsequently performed; whereas, a cause of action arising under a breach of covenant may be barred by the acceptance by parol of a new executory agreement in satisfaction thereof. (*Clough* agt. *Murray*, 3 *Robt.* 7.)

2. All the cases on this subject lay great stress on the existence of some agreement to accept the new undertaking in place of the *performance* of the old, and the distinction between accepting the acts agreed to be done, or the thing to be delivered in satisfaction, and an acceptance of the mere agreement to do or deliver them in the same

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way, is preserved. There must be an accord. (*Id.*)

3. Hence it is necessary, in all cases, to allege and prove, either by the terms of the new contract, or evidence *alunde*, the existence of an agreement to accept in satisfaction of the prior contract such new contract itself, and not the mere performance of its terms. (*Id.*)

4. The plaintiff proposed in writing, in June, 1861, to do three things on certain terms therein specified, viz: 1st. To release the latter from all the obligations of a contract between the parties, made in October previous; 2d. To return to him four of certain promissory notes therein mentioned; 3d. To release him from all obligations in selling certain merchandise (plumbago). The defendant was required, among other things, to discharge a certain note of his, in which a certain sum (\$540) was due; to pay a small sum (\$21) for interest; and to deliver over certain notes of his own for certain amounts, as well as notes of S. & C. It closed by the plaintiff agreeing to return such four notes when the defendant had paid the note for \$540 and the \$21 to the plaintiff, and have passed over to him such notes of S. C. and his own, or to have them ready for delivery on a certain day, which should be prior to a specified day in July; and that on those terms he would give the defendant a receipt in full for all demands (except a certain specified note), cancel the contract, and take also a receipt in full for all demands. The referee found as facts, not only the absence of any understanding between the parties that the making and acceptance of such proposition, and the defendant's assumption, thereby, to perform what was therein required of him, should be a substitute for or in extinguishment of the original agreement, or of the defendant's promise as maker of the five notes therein mentioned, but an actual understanding that only his performance of the terms of the proposition should determine and put an end to the original agreement, and his liability as maker of the notes. *Held*, that this was a mere accord, where performance, and only that, was to be satisfaction, or work an extinguishment of prior liabilities; and that the terms never having been complied with, the proposition was no bar to an action upon one of the defendant's notes specified therein. (*Id.*)

ACKNOWLEDGMENTS.

1. Under the act of 1860 (*Laws of 1860*,

594), regulating assignments, an assignment for the benefit of creditors must be acknowledged by the debtor in person. It cannot be acknowledged by his attorney or proved through the medium of a witness. (*Adams agt. Houghton*, 3 Abb. N. S. 46.)

2. To entitle any conveyance or written instrument, acknowledged or proved under the preceding section (relating to acknowledgment or proof made out of the state of New York, and within any other state or territory of the United States), to be read in evidence or recorded in this state, there shall be subjoined or attached to the certificate of proof or acknowledgment, signed by such officer, a certificate, under the name and official seal of the clerk, register, recorder or a prothonotary of the county in which such officer resides, or the clerk of any court thereof, having a seal, specifying that such officer was, at the time of taking such proof or acknowledgment, duly authorized to take the same, and that such clerk, officer, recorder or prothonotary is well acquainted with the handwriting of such officer, and verily believes that the signature to said certificate of proof or acknowledgment is genuine. (*Laws of 1848*, 304, ch. 195, § 2, as amended 2 *Laws of 1867*, 1515, ch. 557, § 1.)
3. This act shall apply to all conveyances or written instruments heretofore proved or acknowledged and recorded, or to which a certificate has been subjoined or attached, as provided by this act, but shall not affect any litigation now pending. (*Id.* § 2.)

ACTION.

1. A right of action, once accrued, can be discharged only by satisfaction or release. A mere waiver has no effect upon it. (*Christianson agt. Linford*, 3 Robt. 215.)
2. A right of action, for wrongfully and without permission raising ores and minerals from lands situate in another state, belonging to another person, and selling and converting them, is assignable, and may be prosecuted in the courts of this state by one to whom the owner has assigned such ores and minerals, and all claim for their wrongful conversion. (*Hoy agt. Smith*, 49 Barb. 360.)
3. An action for damages to recover money embezzled need not prove the specific property taken. (*Gordon agt. Hostetter*, 37 N. Y. R. 99.)
4. Where, by the terms of a contract, it

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is provided that payments shall be made previously to the execution of a deed, it is not necessary for the plaintiff to convey, or to offer to convey, before bringing the suit, even for the last installment. (*Paine agt. Brown*, 37 *N. Y. R.* 228.)

5. Where the time appointed for payment may happen before the time appointed for the conveyance of the property, an action for the money may be maintained without tendering a conveyance. etc. (*Id.*)
6. Although, as a general rule, a demand due to several persons jointly cannot be subdivided so as to allow the individual interests to be separately recovered, yet this may be done by the debtor's consent. (*Carrington agt. Crocker*, 37 *N. Y. R.* 336.)
7. When, in an action upon an award in favor of two parties jointly, the defendant insisted that one of the parties was improperly joined in the action, because he, the defendant, had purchased and paid for the interests of one of the joint parties in said award, and the plaintiff, by leave of the court, amended his complaint by striking out the name of his partner as a party plaintiff, *held*, that the defendant had consented to the subdivision of the claim, and was liable to the individual party for his interest in the award. (*Id.*)
8. Tenants in common must join in actions for injuries to the realty. (*De Puy agt. Strong*, 37 *N. Y. R.* 372.)

AFFIDAVIT.

1. A party to an action, as well as any other witness, may be compelled to make an affidavit, under subdivision 7 of section 401 of the Code of Procedure. (*Fisk agt. Chicago, &c. R. R. Co.* 3 *Abb. N. S.* 430.)
2. A "fishing" examination is not allowable under that section. An order for the examination can only be made upon proof that the affidavit of the witness is "necessary;" and to allege this involves knowledge in advance of the facts to which the witness will testify. (*Id.*)
3. The proper course, when an affidavit is desired, is, ordinarily, to draft an affidavit and submit it to the witness to be verified, before applying for an order. (*Id.*)
4. But the objection that no affidavit has

been prepared and submitted may be waived; and it is waived if, when asked to make affidavit, the witness does not require a draft to be submitted, but makes a general refusal to testify. (*Id.*)

5. After a witness has refused to make affidavit, and an examination has been ordered, the court should not arrest it upon the ground that an affidavit has subsequently been tendered, unless it very clearly appears that such affidavit is full and frank. (*Id.*)
6. No examination of books and papers is allowable in the proceeding authorized by subdivision 7 of section 401 of the Code. (*Id.*)
7. It is allowable, on application for orders of publication, and of a like nature, to read affidavits made and entitled in another action. (*Barnard agt. Heydrick*, 49 *Barb.* 62.)
8. It is to be presumed, from the fact of making an order for publication, that the affidavits recited therein afforded satisfactory evidence to the court of the requisite facts as to the plaintiff's inability to serve the summons on the defendants within this state. Hence, the omission so to state in the order does not affect its validity. (*Id.*)

AGREEMENT.

- 1 In February, 1864, the plaintiff and defendant entered into a written agreement, by which the former agreed to deliver at a railroad station a quantity of lumber, and the latter agreed to pay a specified price for such lumber, on delivery. In pursuance of this agreement, the plaintiff transported and deposited at the place of delivery a quantity of lumber, but it was not measured or inspected, and the defendant was not there to receive it and to make payment. On the 6th of September, the parties met and examined the lumber, when the plaintiff, by reason of the defendant's delay in receiving and paying for the lumber, refused to deliver it upon the contract. The parties then entered into another contract for the sale of the lumber, whereby the defendant agreed to pay and the plaintiff agreed to receive an enhanced price for such lumber and for the purchase and sale of other lumber. *Held*, that the new contract was not a parol alteration of the former written contract, but it was in substance and effect a new contract in lieu of the former one which the plaintiff refused to perform; and that it was valid, and would sup-

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port an action. (*Keeney* agt. *Mason*, 49 *Barb.* 254.)

2. *Held, also*, that such new contract having been *executed* by the delivery of lumber upon it, and the payment of money by the defendant, and a promise to pay the balance, it was too late for him to recede from it or to object to its validity. (*Id.*)

3. By an agreement between the parties, dated February 11, 1861, reciting that they had agreed to continue the connection between them for three years from January 1, 1861; in the same way as theretofore, it was stipulated that the arrangement made with the plaintiff was to share the profits or losses of the defendants' business in the above mentioned time, at the rate of 17½ per cent; but that it was not to convey to the plaintiff the right of partnership in the defendants' firm, of signing the name of the firm, &c.; and that he was to superintend as salesman the department of general dry goods; that the plaintiff should be at liberty to draw \$2,500 a year in monthly installments, for his personal and other expenses; that the capital then standing to his credit on the books of the firm, as well as the surplus of profits for the next three years, if any, should remain in the business, to his credit, at seven per cent interest, during the term of the agreement; that in case of the death of either of the defendants during the three years, the agreement was to remain in force with the surviving partner, if he should continue the business; and that in case of the death of the plaintiff, the books of the firm might be balanced either on the 31st of December or 30th of June, whichever date might follow after his death, and the balance found due to him should be paid to his representatives. *Held*, 1. That whatever might be the character of the parties in respect to creditors or others, as between themselves they were not co-partners. 2. That the provision in the agreement, that in case of the plaintiff's death the books of the firm might be balanced either on the 31st of December or 30th of June, excluded the idea that they should be balanced at any other time within the three years. 3. That as the accounting was not to be made until the expiration of that period, the profits and losses were to be calculated upon the whole, and not upon any fractional part of it—not upon every year, or month, or week within it; but that the gross profits and losses of the specified term of the contract were to constitute the elements

of the accounting. (*Osbreys* agt. *Reimer* 49 *Barb.* 265.)

4. Accordingly *held*, that the conclusion of the referee, "that the defendants had no right to charge the plaintiff interest on losses for the first year, nor to reduce the amount loaned them by the plaintiff, in consequence of such losses," was correct. (*Id.*)

5. On settling and arranging a partnership loss between the parties, the sum of \$35 was found due from the plaintiff to the defendants. It was, thereupon, mutually agreed between them, *by parol*, that this sum should be *applied* upon a demand the plaintiff had against the defendants, and the demand *cancelled*. Nothing beyond mere words passed between the parties, and although a receipt for the plaintiff's demand was to be given, none was ever executed. *Held*, that the agreement was void by the statute of frauds. (*INGALLS, J., dissented.*) (*Brand* agt. *Brand*, 49 *Barb.* 346.)

6. An application of one demand to the payment or extinguishment of another, not proved by any act of the parties, cannot be claimed as legally flowing from a parol agreement that such application shall be made. (*Id.*)

7. By a contract between the parties, the defendants agreed to procure fifty cotton warps to be manufactured, and to sell and deliver them to the plaintiff at a specified price, to be paid on delivery. The defendants delivered twenty-eight of the warps to the plaintiff, and procured the remaining twenty-two to be manufactured, but instead of delivering them to the plaintiff, they sold them to another person, at a price exceeding that which the plaintiff agreed to pay, and used the proceeds. In an action by the plaintiff to recover such excess, the complaint alleged the transaction to be a sale by the defendants of warps belonging to the plaintiff and delivered to the defendants as his agents to sell on his account. *Held*, 1. That the contract was executory, and under it the title to the warps did not pass to the plaintiff till delivery. 2. That without title to the twenty-two warps, the plaintiff could not adopt the sale made by the defendants as his own; his only remedy being for a breach of the executory agreement to deliver them to him. 3. That he could not recover in this action, with the complaint in its present form, without establishing an express agreement by the defendants to sell the warps on his account. (*Sharp* agt. *Simons*, 49 *Barb.* 407.)

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8. Where the plaintiffs loaned to the defendants \$10,000 in gold, and the latter agreed to repay the loan in gold, and repeatedly afterwards promised to return gold to that amount: *Held*, that the act of congress, commonly called the legal tender act, did not apply to the transaction; and that the plaintiffs were entitled to damages for a breach of the contract, in not returning the \$10,000 in gold. (WELLES, J., dissented.) (*The Bank of the Commonwealth* agt. *Van Vleck*, 49 Barb. 508.)
9. *Held*, also, that the plaintiffs had not released the defendants from the obligation of the contract, by receiving from the latter their check for \$10,000, on which they received the money in legal tender notes, crediting the check to the defendants in their general account, where it appeared that the check was received as a deposit, like any other deposit, and that the plaintiffs did not intend, by receiving it, to satisfy or discharge the defendant's obligation under the contract. (*Id.*)
10. Where a person, since the passage of the legal tender act, promises, for any valid consideration, to return gold or silver, instead of the national currency, he is bound to return those specific things, precisely as he would be bound to return a specific quantity and quality of cotton, if he had, for a valid consideration, promised to do so. (*Per* CLERKE, J.) (*Id.*)
11. Although a complaint sets out an express agreement, it will be sustained by evidence of an implied one. (*Smith* agt. *Lippincott*, 49 Barb. 398.)
12. An implied agreement to pay for materials, &c., when not inconsistent with an existing written agreement between the parties, is admissible in evidence, and will sustain an action to recover the value of such materials. (*Id.*)
13. An agreement by the supervisor of a town to pay a stipulated sum to another, in consideration that the latter will recruit and furnish for the former, and for his town, a certain number of three years naval recruits, or the credit of the same duly made, which sum exceeds the rate of \$600 for each man, contravenes the provisions of section 4 of chapter 29 of the laws of 1865, forbidding the payment of bounties above the amount therein prescribed, and is therefore void. (*Powers* agt. *Shepard*, 49 Barb. 418.)
14. The fact that such a contract is not made with a volunteer, nor for the payment of bounties, will not authorize a recovery thereon. The policy of the law is destroyed by permitting contracts for procuring volunteers by the payment to any one of an amount beyond the sums prescribed by the act for bounty and hand money. (*Id.*)
15. If a written contract, by reason of any mistake of fact, does not express the agreement in fact, a court of equity may reform and correct it by decree, in a direct action for that purpose; but it cannot be changed or reformed by parol evidence, in an action at law arising upon an alleged breach of such contract, in which the plaintiff seeks to recover damages only. (*Bush* agt. *Tilley*, 49 Barb. 599.)
16. If an alleged previous oral arrangement is declared upon, as the subsisting agreement, the subsequent written agreement duly executed, the moment it is presented in evidence, destroys the oral one, and takes away its character as an agreement entirely; and no amount of parol evidence can give it force or vitality as against the written version. The written version must be changed, or the contract must stand and be performed as first written. (*Id.*)
17. Forms of contracts for public purposes, although prescribed by statute, may, if not indispensable for accomplishing such purposes, be disregarded, where the public would suffer for want of the accomplishment of such purposes. (*Per* ROBERTSON, Ch. J.) (*The Harlem Gas Light Co.* agt. *The Mayor, &c. of New York*, 3 Robt. 100.)
18. When a contract for the sale and delivery of goods is divisible and capable of a separate physical performance, a delivery and acceptance of part is sufficient, under the statute of frauds. But when the contract is indivisible, and cannot, by its terms, or physical or other impossibility, be performed in separate parts, the whole contract must be performed at one time, and there can be no such thing as a part performance. (*Flanagan* agt. *Demarest*, 3 Robt. 173.)
19. A contract for the sale and delivery of a "cargo" or "boat load" of barley, of about 9,000 bushels, is an entire indivisible contract. It cannot be separated into parts, and is incapable of part performance. Neither less nor more than a "cargo of barley" can be tendered as performance by the vendor. Nor is the purchaser bound to accept a cargo of less than about 9,000 bushels. (*Id.*)
20. If, in such a case, a cargo of 5,070 bushels of barley arrives, and is ten-

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- dered to the purchasers, they may reject it, as not being in performance of the contract. Upon their refusing it, no right of action will accrue to the vendors. Upon a demand by the purchasers of a cargo "of about 9,000 bushels," the vendors, on a neglect or refusal to deliver, will be liable for a breach of the contract. But if the purchasers *accept* and *pay* for a cargo of 5,070 bushels only, this will be deemed either a *waiver* of the right to object or insist that it is not a full and complete performance of the contract, or the making of a new contract. (*Id.*)
21. The delivery and acceptance of a part of the goods, to take a case out of the statute of frauds, must be a part of a known and defined quantity, which can be disjoined or separated from the whole, not a part of an entire thing which it was intended should be delivered in bulk. (*Id.*)
22. If goods tendered in full performance of a contract do not correspond with the description of them in it, the purchasers should reject them. They cannot qualify their acceptance, so as to make such a delivery a mere part performance. The very act of acceptance determines the completeness of the performance. (*Id.*)
23. An agreement having been entered into between G. & Co. and D. & T., for the purchase and shipment by the latter firm, from Cuba to New York, of cargoes of sugar coconsigned to G. & Co., to be insured by G. & Co. on joint account, and at the joint expense of both firms, an open policy of insurance was effected by G. & Co. for the benefit of themselves, or "whom it may concern," upon which goods purchased under such agreement were entered belonging to both firms jointly. *Held*, that D. & T. were liable, as joint contractors with G. & Co., to the insurers, for the portion of the premiums remaining unpaid. (*The Sun Mutual Insurance Co. agt. Davis*, 3 *Robt.* 254.)
24. Under an allegation in a complaint that on a certain day the plaintiff and defendant entered into an agreement, signed by the defendant, setting forth its terms, and an admission in the answer that the defendant signed and executed a contract for the sale, &c., as *alleged in the complaint*, no further proof of a contract is necessary. Its introduction on the trial becomes, therefore, supererogatory. (*Spear agt. Hart*, 3 *Robt.* 420.)
25. If, in such case, the plaintiff rested his case without producing any written agreement, no question could arise under the statute of frauds. The averment that the parties had made an *agreement* was a sufficient averment of a valid contract. (*Id.*)
26. The statute of frauds does not require that both parties should sign one paper containing the contract, but only that each party must *subscribe* it. The subscription may be upon two separate papers, by the parties separately. (*Id.*)
27. Where the time for the performance of a contract for the delivery, by a vendor, of goods sold, has been *indefinitely* extended, by agreement of the parties, and a reasonable time for performance has elapsed, the right of either party to sue must depend on a demand or tender. The purchaser will have no right of action until a demand and refusal. (*Newton agt. Wales*, 3 *Robt.* 453.)
28. The time for performance of a contract is never indefinitely postponed by law, except by special agreement. It must be governed by the rule of reasonableness, unless the performance be on demand. (*Id.*)
29. What evidence will justify a charge that, if there was any extension of time, it was indefinite. (*Id.*)
30. The absence of technical promissory words is of no practical moment, where the language employed is such as to raise an imperative legal obligation to pay. (*Barney agt. Worthington*, 37 *N. Y. R.* 112.)
31. When a creditor authorizes his debtors to draw on him, for the purpose of procuring such draft to be discounted, and the avails thereof to be remitted to him, the drawee, for his benefit, such drawee becomes in effect the borrower, and is liable, independent of the question of acceptance of the draft. (*Id.*)
32. An agreement between plaintiff and a third party, to sell said third party stone and take the notes of defendant for the same, will not bind said defendant to give his notes, even though it should be proved that he had knowledge of said agreement. (*Fitch agt. Dederick*, 37 *N. Y. R.* 225.)
33. Mere knowledge by the defendant, that a third party had agreed to procure his notes for any purpose, imposes no obligation or liability in respect thereto upon the defendant. (*Id.*)
34. Where the plaintiff offers to sell all the land which he owns, or that he can

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control, on Ward's Island, to the city of New York, and the city replies by offering to buy all the lands on said island not already owned by it, thereby including other lands than those offered by plaintiff, the minds of the parties do not so meet as to constitute a contract binding upon the parties. (*McCotter agt. Mayor, etc.* 37 N. Y. R. 325.)

35. So, where the city authorizes the comptroller to purchase such lands, without fixing the price to be paid, an important part of the contract is left open for negotiation, and is not binding, as a contract, until the minds meet upon the question of price. (*Id.*)

ALLOWANCES.

1. Where the statute contains a fee bill, there can be no discretion in the court as to the amount of the items specified. (*Downing agt. Marshall*, 37 N. Y. R. 380.)
2. The court has no authority to add items for services not specified in the statute. (*Id.*)
3. In an action for an adjudication upon a will, the authority of the court to make further allowances of costs, under section 309 of the Code, is not applicable. (*Id.*)
4. So far as trustees incur expenses in managing trust property, they are entitled to be re-imbursed from the trust fund. Reasonable attorney's and counsel fees connected with the management of the business of the trust will be allowed as a part of the expenses. (*Id.*)
5. Where the allowance made by the court below is within the limits of its discretion, the appellate tribunal has no authority to review its determination. But if it exceeds the limits of its discretionary authority, it commits an error which may be corrected. (*Id.*)

AMENDMENT.

1. On the trial of a cause, the court has no power, and consequently a referee has none, to allow the amendment of a pleading by inserting a new cause of action or a new defense. (*Ford agt Ford, ante*, 321.)
2. If, on the trial, such an amendment is desired, it can only be obtained by suspending the trial or hearing, and applying on motion to the special term. (*Id.*)
3. The opinions advanced in *Woodruff agt.*

Dickie (31 How. Pr. R. 164), "that a referee is no longer an officer of the court," or that "the court at special term has no more power to grant amendments than the court has on the trial," or "that a referee has all the powers of a court at special term to allow amendments," not concurred in. (*Id.*)

4. A referee appointed to hear and determine a cause is always under the control and direction of the court, and may be removed at its pleasure. (*Id.*)
5. Where the referee, on the hearing, makes an order allowing the amendment of an answer by inserting therein the defense of the statute of limitations, it is an order made without authority; and although it is the subject of exception, and may be reviewed on appeal from any judgment which might be entered on the referee's report, the plaintiff is not restricted to that mode of redress; he may take the more expeditious and less expensive mode, by moving at special term to set aside the order. (*Id.*)
6. The special term possesses the power to set aside any order made by a referee in the progress of a cause, which he had not authority to make; and also the power to compel him to proceed to the trial of the issues referred to him for determination. (*The case of Union Bank agt. Mott*, 18 How. Pr. R. 516, approved and followed) (*Id.*)
7. Where the cause of action alleged is the breach of a subsisting contract between the parties, and the relief asked is a judgment for the amount of damages sustained, leave to amend the complaint, so as to convert the action into one of equitable cognizance, to reform a written agreement, should not be granted on the trial. (*Bush agt. Tilley*, 49 Barb. 599.)
8. The court has power, under section 173 of the Code of Procedure, to permit a defendant to amend his answer by setting up the defense of usury, although the original answer did not allege it. (*Union National Bank of Troy agt. Bassett*, 3 Abb. N. S. 359.)
9. It seems, that the decision of the court at special term, upon such a motion, although involving the exercise of discretion, is reviewable upon appeal to the general term. (*Id.*)
9. The power conferred upon the courts by section 174 of the Code of Procedure, to relieve a party from a proceeding taken against him through mistake, &c., cannot be exercised after the ex-

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piration of the year limited in that section from a notice of the proceeding. (*Amory* agt. *Amory*, 3 *Abb. N. S.* 16.)

10. A judgment of foreclosure and report of sale are "proceedings" amendable *nunc pro tunc*, under section 173 of the Code. (*Hogan* agt. *Hoyt*, 37 *N. Y. R.* 300.)
11. The court cannot allow an amendment of the complaint, the effect of which would be to introduce a new cause of action. The right of amendment is limited to the subject matter for which the action was originally brought. (*Van Syckels* agt. *Perry*, 3 *Robt.* 621.)
12. An amendment will not be allowed, the effect of which would be to enable the plaintiffs to recover the half of a claim which they have purchased since the commencement of the action, and which they could not have recovered as the action was originally framed. (*Id.*)
13. Nor will an amendment be permitted for the purpose of introducing a new cause of action, instead of the one laid in the complaint—a cause of action barred by the statute of limitations. (*Id.*)

ANSWER.

1. In an action upon an award of arbitrators, an answer which seeks to avoid the award on two grounds, to wit: 1st. Misconduct on the part of the arbitrators, and 2d. Mistake in ascertaining the amount due from the defendant to the plaintiff, is sufficient as a defense, on demurrer. (*Garvey* agt. *Carey*, ante, 282.)
2. If a defendant intends to rely upon the defense that the plaintiff purchased the promissory note sued on for the purposes of prosecution, as a practicing attorney, he must set up such defense in his answer, in order to give evidence of such fact upon the trial. (*Wheeler* agt. *Ruckman*, ante, 350.)
3. Where the object of the action was to state the account of the plaintiff with the trust fund, and to discharge the plaintiff from the trust; and accordingly the plaintiff, in the complaint, gave his version of the transaction, claiming to have paid over the whole amount into the hands of his co-trustee, except what he had paid over to the beneficiary of the fund, and showed how this had been done, and asked his discharge: Held, that it was competent for the defendants to falsify such statement, by the allegations in the answer, not only by a direct denial of the allegations in the complaint, but by affirmative allegations, showing a disposition and present condition of the fund different from that which the plaintiff insisted upon. And unless this object in the answer had been so clumsily and ineffectually accomplished, it was error to strike out a large portion of its allegations, as containing wholly irrelevant matter. (*McGregor* agt. *McGregor*, ante, 385.)
4. Upon a motion to strike out matters in an answer for irrelevancy, which is the only ground stated in the motion papers, the court ought not to consider, only incidentally any other question, such as whether the matter sought to be stricken out forms the whole or a material part of a defense or a counter-claim. These questions only properly arise upon demurrer, or on the trial of the action. (*Id.*)
5. As a general rule, the validity of a defense to an action is not to be tested by a motion to strike out. (*Id.*)
6. Sham and irrelevant defenses may be stricken out, and matter of the same description may be stricken out on motion, or may give occasion for a motion for judgment, notwithstanding the answer. But the matter must be palpably sham or irrelevant. (*Id.*)
7. Where an answer alleged that it was agreed between the defendant and the plaintiffs, upon her purchasing goods of them, "that she was to make payments from time to time, as she could, out of her business, and from the proceeds of the sales" of the goods: Held, that it was erroneous for the judge at the trial to construe the answer as meaning that the defendant was to make payments from time to time, as she conveniently could. (*Johnson* agt. *Plowman*, 49 *Barb.* 472.)
8. Held, also, that it was erroneous for the judge to charge the jury that, if they believed that the defendant purchased the goods with the understanding that she should pay for them when convenient, and that it had not been convenient for her to pay before the action, they should find for the defendant. (*Id.*)
9. Upon such an answer, the burden of proof is with the defendant. (*Id.*)
10. In an action for a limited divorce on the ground of cruelty, the defendant cannot set up as a defense or counter-claim the adultery of the plaintiff. (*Henry* agt. *Henry*, 3 *Robt.* 614.)
11. The question whether facts set up in

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mitigation are or are not such as should be admitted to be given in evidence for that purpose, can only be determined by the presiding judge, upon the trial. (*Smith agt. Trafton, 3 Robt. 709.*)

12. Whether or not the plaintiff is sufficiently apprised, by the contents of the answer, of circumstances to be introduced by the defendant in mitigation of damages, depends upon the question whether at the trial, if the evidence offered in its support is admitted, he will be taken by surprise, and therefore be unable to proceed with such trial. (*Id.*)

13. The allegation of matter in mitigation of damages, in an answer, is not material; it requires no reply, is not the subject of demurrer, and not being set up as a defense, but as a notice merely, a motion to make such matter more definite and certain cannot be entertained. (*Id.*)

APPEAL.

1. On appeal from an order appointing a receiver in supplementary proceedings, objections to the preliminary affidavit upon which the proceedings were originally founded cannot be entertained, where there is nothing in the papers to show that such objections were made before the county judge, or that he made any decision relating to them. (*Union Bank of Troy agt. Sergeant, ante, 87.*)

2. The proper remedy in such case would have been to have made a motion to vacate the original order. (*Id.*)

3. The objection that the execution appears to have been issued after the expiration of five years from the entry of judgment, cannot be entertained on such appeal. If the execution was improperly issued, the defendant should have applied to the court to set it aside for irregularity. (*Id.*)

4. The scheme and principle proposed by the chapter of the Code in relation to costs, is, that where costs are allowed, they shall be paid by the fund or party who would be benefited by a counter judgment. (*Columbian Ins. Co. agt. Stevens, ante, 101.*)

5. Such a question is not one addressed to the discretion of the court in such a sense that no appeal lies to this court from the decision made in the court below. (*Id.*)

6. Where on the trial the defendant makes no request to submit a certain

question of fact, upon which there is some evidence, to the jury; or to take objection to the insufficient proof of demand of personal property before suit brought, he cannot avail himself of such omissions upon appeal to the general term. (*Shafer agt. Guest, ante, 184.*)

7. An order of the county court, dismissing an appeal from a justice's judgment, is a final determination of the rights of the parties in the action, and is therefore a judgment within section 245 of the Code of Procedure. (*Pearson agt. Lovejoy, ante, 193.*)

8. The personal notice of the judgment, required by section 353 to limit the time to appeal, means a personal notice from the party who has obtained the judgment; and such notice must also be a written notice, or the limitation does not take effect. (*Id.*)

9. In cases where there has been no personal service of process, and the defendant did not appear, it was not intended that the important right of appeal should be limited to twenty days after the defendant might be informed by some means of the existence of the judgment. (*Id.*)

10. Statutes giving the right of appeal are to be liberally construed in furtherance of justice; and such an interpretation as will work a forfeiture of such right is not to be favored. (*Id.*)

11. A general appearance by the respondent in the county court, and noticing the appeal for argument, are positive acts of submission to that tribunal, inconsistent with his claim that the appeal was not in time, and therefore a waiver of his right to have the appeal dismissed. (*Id.*)

12. An order affirming an order of the special term, denying a motion for a re-taxation of costs, and to correct the judgment roll, is not appealable to this court. (*Hoe agt. Sanborn, ante, 197.*)

13. An order dismissing an appeal from an order of the special term, refusing a mandamus, is not appealable to this court. (*Id.*)

14. An order dismissing an appeal from an order of special term, denying a motion to correct or re-settle the case, is not appealable to this court. (*Id.*)

15. But an appeal from the judgment brings up for review the order in relation to the re-taxation of costs and the correction of the judgment roll. The question as to which party is entitled to costs is a matter of strict legal right.

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- and necessarily involves the merits. (*Id.*)
16. The findings of a judge, who hears the trial of a cause, upon questions of fact, are conclusive, under the same rule that the findings of a jury or a referee are conclusive upon that question. (*Ritter* agt. *Cushman*, ante, 284.)
17. In an action against a common carrier for damages arising from injury to property, where there is no question of law, but the only question arising in the litigation is one of fact, the judgment of the court below will be affirmed. (*Hunt* agt. *Michigan Southern, &c. R. R. Co.* ante, 287.)
18. Where a justice of the peace, under the provisions of section 371 of the Code, and after a written acceptance of an offer, upon appeal, to allow judgment for a certain sum, "makes a minute thereof in his docket, and corrects such judgment accordingly," but refuses to allow *disbursements and costs in the court below to the appellant*, the appellant may apply to the county court by motion and have such costs taxed, and judgment entered in his favor for the amount in the county court; and an appeal can be taken therefrom to the supreme court. (*Ponto* agt. *Phelps*, ante, 364.)
19. Where a judgment of the court below on appeal is *affirmed* as to one defendant, and *reversed* as to the other defendant, not being *jointly* liable, the joint obligors who executed the *undertaking* given on the appeal for both defendants, are liable to pay the judgment of affirmance. It is a case of judgment affirmed in part and reversed in part. (*Affirming S. C. 17 How. 394, and Gardner* agt. *Barney*, 24 How. 467.) (*Seacord* agt. *Morgan*, ante, 487.)
20. An order to show cause against striking out certain allegations in the defendant's answer, consisting of a set off and payment, in case he should fail to furnish by a certain day the particulars thereof, is not appealable. (*Watt* agt. *Watt*, 3 Robt. 615.)
21. The decision of a motion is not to be considered as a *res judicata*. Motions may be reheard on leave, on special occasions, but not on the same facts. The granting of leave to renew a motion rests in the discretion of the court, although on the rehearing it may be bound to take the same view of the facts as the judge who first heard the motion. Such an order is not appealable. (*Smith* agt. *Spaulding*, 3 Robt. 615.)
22. An order extending the time for the plaintiff to sign and file a stipulation which he has omitted to do, "in furtherance of the justice of the case," rests in the discretion of the court; and as it involves no substantial right, is not reviewable upon appeal. It does not belong to either of the classes of orders which, according to the Code, may be re-examined at the general term. (*Butler* agt. *Niles*, 3 Robt. 644.)
23. An appeal does not lie from an order granting a motion for judgment on account of the frivolousness of a demurrer to the complaint, under section 247 of the Code. The defendant can only appeal after judgment is entered for damages and costs, when the decision made at the special term may be reviewed upon that appeal. (*ROBERTSON*, *Ch. J. dissented.*) (*Joannes* agt. *Day*, 3 Robt. 650.)
24. On appeal to the county court from a judgment of a justice's court, the county court should disregard errors of the justice not affecting the merits, and give judgment according to the justice of the case. (*Orin* agt. *Nichols*, 49 Barb. 145.)
25. Where the real question involved in an action has not been presented or determined, the verdict will be set aside. (*Bunnell* agt. *Greathead*, 49 Barb. 106.)
26. When the order of the supreme court reversing a judgment fails to show that the judgment was reversed upon questions of fact, it must be assumed to have been upon questions of law, arising upon exceptions taken at the trial. (*Baldwin* agt. *Van Dusen*, 37 N. Y. R. 487.)
27. An appeal will lie to this court from an order of the general term refusing to vacate an attachment, where such vacation is asked for as a matter of law and of strict right, and not involving any question of discretion. (*Tracy* agt. *First National Bank of Selma*, 37 N. Y. R. 523.)
28. A receiver of an insolvent corporation cannot interfere in a case, as by giving notice of a motion, or conducting an appeal in his own name, until he has been made a party to the action by an order of the court. (*Id.*)
29. Under the law of this state, as it stood prior to the constitution of 1846, a decision of a judge at circuit, refusing an application for a postponement of the trial of a cause, made upon the ground of absence of a material witness, was regarded as so far affecting a substantial right as to be subject to review,

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and, if erroneous, to reversal. (*Howard* agt. *Freeman*, 3 *Abb. N. S.* 292.)

30. There is nothing in the legislation upon procedure, passed under the constitution of 1846, to change this rule. The power of a judge presiding at the trial of a common law action, to grant or refuse a postponement, must still be exercised according to law; and his decision is reviewable. (*Id.*)
31. An order denying an application of a party who has been dispossessed from real property under a writ of assistance which has since been vacated, to be restored to the possession, is appealable. (*Chamberlain* agt. *Choles*, 3 *Abb. N. S.* 118.)
32. An appeal may be taken to the court of appeals from an order of the general term affirming an order of the special term denying a motion to set aside a judicial sale made under a judgment. (*King* agt. *Platt*, 3 *Abb. N. S.* 174.)
33. Such an order is final; it affects a substantial right; and it is an order made upon a summary application in an action after judgment. (*Id.*)
34. Such an order is not purely discretionary with the court below, in such a sense as to prevent it from being reviewed. (*Id.*)
35. An appeal in such a case is in time, if taken within two years from the entry of the order. The order is in the nature of a judgment, within the meaning of the Code of Procedure. (*Id.*)
36. An appeal from an order overruling a demurrer does not operate, by itself, as a stay of proceedings. (*Christy* agt. *Libby*, 3 *Abb. N. S.* 423.)
37. A stay may be granted by the court; but in ordinary cases only upon terms of defendant giving security. (*Id.*)
38. An appeal from an order of the county court, granting a new trial, on the judge's minutes, is an enumerated motion, and must be placed upon the calendar, and brought on upon printed papers. (*Harper* agt. *Allyn*, 3 *Abb. N. S.* 186.)
39. It is an error of law, reviewable upon appeal to the court of appeals, for a court to find a fact of which no proof whatever is made. (*Brush* agt. *Lee*, 3 *Abb. N. S.* 204.)
40. But to render the objection available in the court of appeals, the proper exception must be taken in the court below on behalf of the party injured. If the fact found, if true, sustains the judgment appealed from, and no exceptions appears to have been taken to the defect of proof, the court of appeals will affirm the judgment, however deficient the proof may be. (*Id.*)
41. The authority of the general term, upon appeals from the special term, is not confined to a simple reversal or affirmance; but it may make such order as the special term should have made in the first instance. (*Howard* agt. *Freeman*, 3 *Abb. N. S.* 292.)
42. Upon an appeal from a judgment of a county court to the supreme court, the successful party is entitled to the full costs given by subdivision 5 of section 307 of the Code of Procedure. (*Gray* agt. *Hannah*, 3 *Abb. N. S.* 183.)
43. The right to those costs being given by statute, any provision in the order of the supreme court determining the appeal, which purports to limit the costs to a less sum—e. g., a provision awarding motion costs only—is a nullity. (*Id.*)
44. Entering an order containing such a provision is not a waiver of the statutory costs. (*Id.*)

ARBITRATION AND AWARD.

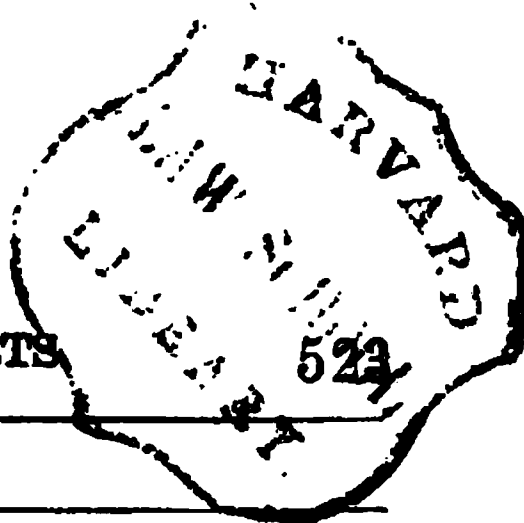
1. In an action upon an award of arbitrators, an answer which seeks to avoid the award on two grounds: 1st, Misconduct on the part of the arbitrators, and 2d, Mistake in ascertaining the amount due from the defendant to the plaintiff, is sufficient as a defense, on demurrer. (*Garvey* agt. *Carey*, ante, 282.)
2. A party cannot enter a judgment upon an award in his favor, unless the submission pursuant to which it was made be in conformity with the statute respecting arbitrations. Nor can any judgment be entered on an award, under the statute, until the submission be proved by the affidavit of a subscribing witness thereto. (*Goodsell* agt. *Phillips*, 49 *Barb.* 353.)
3. If there is no subscribing witness to the submission, so that the plaintiff cannot comply with the requirement of the statute, he is not entitled to a judgment upon the award. (*Id.*)
4. And if the plaintiff applies for judgment upon the award, without notice to the defendant, the latter will not waive the objection that the submission was not proved by the affidavit of a subscribing witness, by not opposing such application. (*Id.*)

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5. Nor will he waive the objection by taking part in the proceedings before the arbitrators, knowing that there is no subscribing witness to the submission; nor by omitting to move to vacate, modify or correct the award. (*Id.*)
 6. A party to an arbitration may resort to the original cause of action embraced therein, where the award of the arbitrator is void. (*Morton agt. Cameron, 3 Robt. 189.*)
 7. Under the provisions of the Revised Statutes relative to the submission of controversies to arbitration, no judgment can be entered upon an award of arbitrators, unless the submission is proved by the affidavit of a subscribing witness. When, therefore, the submission is not attested by any subscribing witness, any judgment entered upon it is irregular, and should be set aside on motion. (*Goodsell agt. Phillips, 3 Abb. N. S. 147.*)
 8. An award founded on an unattested submission may, however, be enforced by action. (*Id.*)
 9. The objection to the propriety of entering judgment upon an award founded upon a submission unattested by a subscribing witness is not waived by attending and proceeding before the arbitrators, pursuant to such submission. (*Id.*)
 10. An award of arbitrators cannot be enforced by a judgment, under the provisions of the Revised Statutes, unless it is made pursuant to the written submission. (*Matter of Schafer, 3 Abb. N. S. 234.*)
 11. Where an award is not made within the time prescribed by the original submission, but within an oral extension given by the parties, it may be valid as an award, and enforceable by action, but cannot be the basis of a judgment. (*Id.*)
- an order issued in any other case; and is not required to be in a sum equal to double the value of the property, as stated in the affidavit of the plaintiff accompanying the replevin papers. (*Id.*)
3. Consequently, where the order specifies the sum in which the defendant is to be held to bail at less than double the sum stated in the affidavit, it does not make the order void; and being for the benefit of the defendant, he cannot move to set it aside on that ground. (*Id.*)
 4. An order of arrest is not defective because it omits to recite the subdivision (of § 179) under which it is issued. Although this would be a convenience, and probably would be better to incorporate such fact in the order, yet it cannot be regarded as absolutely obligatory, because the statute does not require it; and the court must be careful not to put into the statute words which it does not contain. (*Id.*)
 5. On a motion to discharge an order of arrest, where there is no sufficient evidence produced that the order was issued under subdivision 3 of section 179, the motion cannot succeed, where it is conceded by the mover that, if the order was not issued under that subdivision, it is unobjectionable. (*Id.*)
 6. A defendant cannot succeed on a motion to set aside an order of arrest, by claiming that it was issued under subdivision 3 of section 179, in reference to a concealment of the property, which he attempts to explain satisfactory, but upon which point there is contradictory evidence, while the plaintiff's case is almost undenied upon the point—which is the *gravamen* of the complaint, that false and fraudulent representations were made by one of the defendants in the purchase of the property on credit, which would bring the action under subdivision 1 of section 179. (*Id.*)
 7. If the defendants, in an action for claim and delivery, claim the benefits of the purchase of the property, which it is alleged was made by their agent fraudulently, although they allege a want of knowledge of such fraudulent purchase, they thereby indorse the agency. (*Id.*)
 8. Every ratification of an assumed agency is equivalent to an original authority. (*Id.*)
 9. An order of arrest may be made to accompany the summons, or at any time afterwards, before judgment. (*Code, § 183.*) The word "judgment" here mentioned, is defined to mean "the

ARREST.

1. There is but one form of order of arrest prescribed in the Code, and that is contained in section 183. All orders of arrest must contain the requisites therein stated. They must require the sheriff to arrest the defendant and hold him to bail; and must require this to be done in a specified sum. (*Tracy agt. Veeder, ante, 209.*)
2. The order of arrest issued under subdivision 3 of section 179 must be in form conformable to section 183, the same as



final determination of the rights of the parties in the action." (*Mott* agt. *Union Bank of New York*, ante, 332.)

10. A judgment obtained by default, founded on allegations of fraud, is such a judgment. But if the defendant moves and obtains an order opening the judgment with, liberty to answer on terms, an order of arrest may be issued against him, notwithstanding the judgment is directed to stand as security. (*Id.*)
11. If defendant, in an action for conversion, moves to vacate an order of arrest granted upon an affidavit averring a demand of the property from him, it is for him to show that timely objection to the authority of the agent making the demand was made, or that the defendant had rightfully a lien upon the property at the time of demand, if he relies upon either of those facts as an objection to the validity of it. (*Ballouhey* agt. *Cadot*, 3 Abb. N. S. 122.)
12. A defendant who has appeared generally in an action cannot afterwards avail himself, on a motion to vacate an order of arrest, of an objection that the Christian names of the plaintiffs are not stated in the papers on which the order of arrest was obtained. (*Id.*)
13. On motion to vacate an order of arrest made upon the original papers only, if the necessary facts are positively sworn to in the plaintiff's affidavit, and if deponent can have had knowledge of them, the court will not vacate the order on the ground that the statements which it contains were probably not within his knowledge. (*Id.*)
14. When a defendant, against whom an order of arrest has been issued, moves to vacate it, upon the ground that an action on the debt alleged has been barred by a discharge in insolvency, granted under either of the statutes of New York upon that subject, the court has power to examine into the validity of the discharge. (*American Flask and Cap Co.* agt. *Son*, 3 Abb. N. S. 333.)

ASSESSMENT AND ASSESSORS.

1. Though erroneous, is not void, where the assessors have jurisdiction of the person of the party and of the subject matter of taxation. (*Swift* agt. *City of Poughkeepsie*, 37 N. Y. R. 511.)
2. It seems a statement of debts due to non-residents, filed by the agent thereof with the county treasurer, according to the requirements of the statute (*Laws* 1851, p. 2), is not conclusive on the assessors; and it is their right to inquire

further and ascertain by other agencies the amount which may be due within their district. (*People* agt. *Halsey*, 37 N. Y. R. 344.)

3. The amount determined by the assessors to be due is conclusive on that point until set aside by a proceeding instituted for such purpose; and it is not within the authority of the county treasurer to question its accuracy or legality, when called upon to issue his warrant for the collection of the tax assessed upon such estimate. (*Id.*)
4. Where assessors have jurisdiction of the person of the plaintiff, and of the subject matter of taxation, although their assessment may be erroneous, it is not void, and can be corrected only by an appropriate proceeding for such purpose, and does not lay the foundation for an action at law to redress the alleged injury. (*Swift* agt. *City of Poughkeepsie*, 37 N. Y. R. 211.)
5. The remedy in such cases may be by writ of error or certiorari, to have the assessment roll corrected. (*Per MILLER, J.*) (*Id.*)
6. When the tax has been collected and paid into the treasury of a municipal corporation, the corporation will not be liable in an action for money had and received, etc., to refund the tax illegally assessed. (*Id.*)

ASSIGNMENT.

1. It is competent for debtors in failing circumstances to make an assignment of all their property for the benefit of their creditors, providing that their *confidential* and accommodation creditors shall be *first* paid; *secondly*, that those creditors who had executed a conditional release, fifty per cent on their claims; *thirdly*, the residue of the creditors to be paid. (*Spaulding* agt. *Strang*, 37 N. Y. R. 135.)
2. Debtors have authority to stipulate to pay fifty per cent on the claims of all creditors who will execute a conditional release, agreeing to receive the same in discharge of their claims; and, in making an assignment, it is lawful to prefer such class of creditors. (*Id.*)
3. Those creditors who refuse to execute such conditional release have no legal remedy if nothing remains to apply to their demands, so long as, by the terms of the assignment, the whole property of the debtor is appropriated to the payment of debts. (*Id.*)
4. A joint debtor cannot execute an as-

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signment of joint property, so as to pass the title. (*Gates* agt. *Andrews*, 37 *N. Y. R.* 657.)

5. The right of action for damages for the breach of a covenant against incumbrances may pass, in equity as an incident, by force of a conveyance of the land itself as the principal thing. (*Roberts* agt. *Levy*, 3 *Abb. N. S.* 311.)
6. Proceedings authorized to compel an assignee for the benefit of creditors to render an accounting before a county judge. (2 *Laws* of 1867, 2163, *ch.* 860, § 1; amending *Laws* of 1860, 595, *ch.* 348, § 4.)

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

1. Provisions in an assignment for the benefit of creditors, directing the assignee to continue and carry on a business for the period of eighteen months, at his discretion; to sell and dispose of the assigned property, and such other articles as he may manufacture, on credit, or otherwise; to use the proceeds in continuing the business; to employ the assignor in the business during the continuance of the trust, at a specified salary; leaving it in the discretion of the assignor to say when the trust shall be closed; and providing for the release of the assignor, and excluding from the benefit of the trust creditors who shall object to the trust deed; are contrary to law, and render such deed fraudulent and void as against the creditors of the assignor. (*Renton* agt. *Kelly*, 49 *Barb.* 536.)
2. The proceeds of property fraudulently assigned, while in the hands of the assignees, are held by them as trustees for those creditors of the assignors who are intended to be defrauded by the assignment, and have exhausted their remedy by execution. They are, while undistributed, subject to all the equitable rights of such creditors. (*Lawrence* agt. *The Bank of the Republic*, 3 *Robt.* 142.)
3. Any creditor who has exhausted his remedies at law can attack the validity of an assignment on the ground of fraud, and, by a judgment which avoids the assignment, reach any property remaining in the hands of the assignees, or which is subject to their control. (*Id.*)
4. A judgment creditor of one of two members of a firm, who had, before the recovery of such judgment, assigned all their property, consisting solely of a small amount of partnership goods and chattels, and of real estate belonging to the other partner, to a trustee in trust to pay, first, their partnership, and secondly, their individual debts, cannot hold such assignee responsible for the value of the land assigned, to the extent of such judgment, merely because such assignee had reconveyed such real estate to its original grantor, after the latter had bought up and compromised all the debts of the firm, which exceeded the value of such land, and after the supreme court had, upon petition, with the assent of all the partnership creditors, discharged the assignee from his trust, upon reconveying the land to the grantor. (*Reed* agt. *Allerton*, 3 *Robt.* 551.)
5. Such judgment being against one partner individually, and not against the firm, nor for a firm debt, the party recovering it has no equity to entitle him to have the individual property of the other partner applied to pay it. (*Id.*)
6. If the order of the supreme court, relieving the assignee from all responsibility as trustee under the assignment, was obtained improperly, or on false suggestions, the remedy of such judgment creditor is by an application to that court to set it aside; but so long as such judgment remains in full force, not set aside or modified, it is a complete bar to any action brought by such judgment creditor against him. (*Id.*)
7. The supreme court, as the successor of the court of chancery, has jurisdiction to accept the resignation of a trustee who is assignee of an insolvent debtor, and to discharge him from all liability to account to the *caveat* *que* trust, under the assignment. (*Id.*)
8. An assignment for the benefit of creditors, which directs or authorizes such a disposition to be made of property conveyed, or of its proceeds, as will, if carried into effect by the assignee, necessarily deprive the assignor's creditors of their right to have such property applied to the payment of their claims, is on its face fraudulent, as against the creditors of the assignor. (*Lester* agt. *Pollock*, 3 *Robt.* 691.)
9. A firm consisting of three partners being dissolved, a new firm composed of two of the partners was formed, to whom the third sold out his interest in the former firm. Subsequently the second firm made an assignment for the benefit of creditors, containing a provision to pay off all the debts due and owing by the second firm, or the late prior firm, or either of the members of

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said firms, to one of the assignees. *Held*, that the assignment was invalid as to creditors of the first firm. (*Id.*)

10. It is competent for debtors in failing circumstances to make an assignment of all their property for the benefit of their creditors, providing that their *confidential* and accommodation creditors shall be *first* paid; *secondly*, that those creditors who had executed a conditional release, fifty per cent on their claims; *thirdly*, the residue of the creditors to be paid. (*Spaulding* agt. *Strang*, 37 *N. Y. R.* 135.)

ASSOCIATIONS.

1. The open board of brokers in the city of New York is not a corporation; nor is it a joint stock association; nor is it, as respects questions relating to the continuance or termination of membership in it, a partnership. (*White* agt. *Brownell*, 3 *Abb. N. S.* 318.)
2. That board is a voluntary association of persons who, for convenience, have associated to provide, at the common expense, a common place for the transaction of their individual business as brokers. (*Id.*)
3. The agreement which the members of such an association have made, upon the subject of membership, and what shall be the terms on which it shall be acquired, and the grounds and proceedings upon which it shall be terminated, must determine the rights of parties on that subject. A court of justice must recognize and enforce these provisions of the compact. It cannot substitute another contract for the one which the parties have made. (*Id.*)
4. One who becomes a member in a voluntary association whose rules provide for expulsion on certain grounds, and direct a mode of proceeding before a committee or tribunal of the association, to ascertain whether, in a given case, such grounds exist, submits himself to these rules, and cannot, when they are invoked against himself (nothing unlawful or unconscionable in them being shown), resort to a court of justice to prevent them from being put in force. An injunction against the tribunal of the association, or against an officer of the association charged with executing the decision of the tribunal, will not lie. (*Id.*)
5. Provisions of the constitution and by-laws of the open board of brokers in the city of New York, authorizing the

expulsion of a member who should fail to perform contracts made at board with another member, examined, and adjudged not unreasonable. (*Id.*)

ATTACHMENT.

1. An *attachment* cannot be levied and a lien acquired upon money of a debtor deposited in a bank by another in the name of the latter, to whom the bank has given credit therefor; although the deposit be made collusively with the debtor, and fraudulently as to his creditors. (*Greenleaf* agt. *Mumford*, *ante*, 148.)
2. Neither can an action be maintained by the sheriff, or by a judgment creditor, in aid of such attachment, or to declare or create a lien on the fund, when none was acquired by the attachment proceedings. (*Id.*)
3. Where the jury pass upon the question of the proper transfer to the plaintiff, on a certain day, of a promissory note in suit, such finding fully defeats any claim in attachment proceedings had against the prior owner of such note, after the date of such transfer. (*Wheeler* agt. *Ruckman*, *ante*, 350.)
4. Where the summons is issued and an *attachment* levied upon defendant's property, more than *thirty days* before the service of the summons and complaint upon the defendant out of the state, by which the action is deemed to have been commenced (no service by publication having been made), the attachment becomes wholly *void*, under section 227 of the Code, and will be set aside on motion. But the order of publication will be allowed to stand. (*Waffle* agt. *Goble*, *ante*, 356.)
5. *Proceedings supplementary to execution* are proceedings *in the action*, not *special proceedings*, designated by the Code. (*Seeley* agt. *Black*; *ante*, 369.)
6. Consequently the proceeding by *attachment*, for a violation of an order in supplementary proceedings, is a proceeding in the action; and *costs* therein should be taxed as *costs in the action*, and not as *costs of an action*, which are allowed in special proceedings. (*Id.*)
7. The attachment authorized by section 227 of the Code of Procedure is allowable in actions for legal relief only. It cannot be issued in an action for equitable relief—*e. g.*, an action seeking to have a deed canceled, and an accounting and an injunction and receiver (*Ebner* agt. *Bradford*, 3 *Abb. N. S.* 248.)

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8. A national bank is a "foreign corporation," within the meaning of that term as defined in section 327 of the Code of Procedure; and its property in this state is liable to be attached in an action against it, to the same extent as that of foreign corporations generally. *So held*, where the bank was organized and located in another state. (*Cooke* agt. *State National Bank of Boston*, 3 *Abb. N. S.* 339.)
9. It is good ground for vacating an attachment issued against an alleged non-resident and absconding defendant, that his absence from his place of abode was open and notorious; that he made no efforts to conceal the same; that his conduct was not designed to place any one on a false scent, or to evade service of process; and that he omitted nothing which he was legally bound to do, to enable the plaintiff to find him. The mere failure of a plaintiff to learn the whereabouts of a defendant affords no evidence of culpable conduct on his part. (*Sweeney* agt. *Bartlett*, 3 *Abb. N. S.* 444.)
10. The rule that a motion to discharge an attachment, if founded upon an irregularity, must be made at the earliest opportunity, or the delay excused does not apply to motions for relief affecting the substantial rights of parties. (*Id.*)
11. It is not necessary that a motion to vacate an attachment should be made before judgment; and an order of court granting a motion to open a default, but allowing the judgment entered to stand as security, does not preclude the defendant from afterwards moving to vacate the judgment. *So held*, where the objection to the attachment went to the jurisdiction. (*Id.*)
12. Where a debtor refuses to pay his note on demand, and, on being told by the holder that he will be sued, threatens that if he is sued he will turn over all his property, and that the holder "will not get a cent," the property of the debtor is liable on such threat to an attachment. (*Livermore* agt. *Rhodes*, 3 *Robt.* 626.)
13. Although, when an attachment is ordered to be set aside, a right of action upon the undertaking given when it was issued commences, there is no necessity for directing the undertaking to be delivered to the defendants to be sued, nor of taking it from the files, until the trial of an action upon it, when it may be produced in court. (*Freeman* agt. *Young*, 3 *Robt.* 666.)
14. The Code of Procedure does not authorize an attachment, as a provisional remedy, in an action against a non-resident for the taking and conversion of personal property in another state. (*Knax* agt. *Mason*, 3 *Robt.* 681.)

ATTORNEY AND CLIENT.

1. No clerk of an attorney at law, however extensive his general powers may be, can *discontinue an action* without the consent of his principal. (*Irvine* agt. *Spring*, *ante*, 479.)
2. The law warrants a party in giving faith and confidence to an attorney, who, by law, is authorized to hold himself out as a public officer, clothed with authority to represent others in the courts. (*Hamilton* agt. *Wright*, 37 *N. Y. R.* 502.)
3. Where an attorney appears for a party, the general rule is, that a retainer will be presumed; and the adverse party, having no notice to the contrary, may act upon such presumption. (*Id.*)
4. And, therefore, where an attorney prosecuted an action of ejectment in the name of the grantors and grantee, in a deed purporting to convey lands against a defendant who was in adverse possession thereof when the deed was made, and the recovery was defeated, *held*, that the grantors were liable to the defendant in such ejectment for the costs of the action, notwithstanding such prosecution was without their knowledge, and at the instance of the grantee. (*Id.*)
5. *Semble*, the object of the amendment of section 111 of the Code of Procedure, in 1862, declaring that an action in such case may be maintained by the grantee in the name of the grantor. (*Id.*)
6. There is no rule precluding an attorney from entering into agreement with one who is not an attorney to enter his office and act as his clerk, compensating him by giving him an interest in the business. An execution issued in the name of the employer is not invalid because it was in fact issued by a clerk so employed. (*Brush* agt. *Lee*, 3 *Abb. N. S.* 204.)
7. In an action by an attorney retained to conduct a cause pending on appeal, for compensation for the services employed evidence that there were in fact no merits in the case he was engaged to present is irrelevant. (*Case* agt. *Holchiss*, 3 *Abb. N. S.* 381.)
8. An account rendered by an attorney to his client, containing his charges for

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professional services, if retained without objection, becomes an account stated, and draws interest from the time it was rendered. (*Id.*)

BAIL.

1. A motion to refund money deposited instead of bail, pursuant to section 197 of the Code of Procedure, cannot be made until after the giving and justification of bail. (*Herrmann* agt. *Aaronson*, 3 *Abb. N. S.* 389.)
2. Under section 199 of the Code, the court is authorized to refund the money to the defendant alone. (*Id.*)
3. *It seems*, however, that if there are no conflicting claims made to the money, the court may, at a proper time, make an order that the money be paid to a third person who is shown to have advanced it to the defendant on his arrest. (*Id.*)
4. Where, upon the issuing an order of arrest, the defendant makes or procures to be made a deposit of money, in lieu of giving bail, and the money remains on deposit up to the time when the plaintiff obtains judgment in the action, the plaintiff is entitled to have it applied in satisfaction of such judgment. (*Id.*)
5. The fact that such money was the property of a third person, and was deposited under a special receipt stipulating that it should be returned on the surrender of the defendant, can make no difference. A deposit made in lieu of giving bail, from whatever source derived, must be treated, as between the plaintiff and defendant, as the property of the defendant. (*Id.*)

BANKRUPTCY.

1. Where a bankrupt is under examination before a register, he has no right to consult with his attorney or counsel before answering, except the register shall see good cause for allowing it. (*Matter of Judson*, ante, 15.)
2. Where one who was a member of a late firm files his individual petition in bankruptcy, all his creditors can prove their claims, whether individual or partnership. Partnership assets must be administered according to the 36th section of the bankrupt act, and so must the assets of the separate estate of the bankrupt. (*Matter of Frear*, ante, 249.)
3. By the entry of a decree in bankruptcy, under the act of 1841, and the ap-

pointment of an assignee, the latter becomes *ipso facto* the legal owner of all the real estate belonging to the bankrupt, and is as fully vested with all legal and equitable rights pertaining to such ownership as the bankrupt had theretofore been. (*Price* agt. *Phillips*, 3 *Robt.* 448.)

4. Where premises owned by a bankrupt are subject to a mortgage which is a lien thereon, such mortgage is not an *adverse claim*, within the meaning of the 8th section of the bankrupt act, which requires all suits to be brought by the assignee against any person claiming an adverse interest, touching the property, &c., of the bankrupt, within two years after the decree in bankruptcy. (*Id.*)
5. Nor will the foreclosure of the mortgage, in a suit to which the assignee in bankruptcy is not a party, and the purchase of the property by the mortgagee at the sale under the decree, change the legal position and relation of the rights of the parties. (*Id.*)
6. Such assignee, being entirely unaffected by the decree to which he was not made a party, still remains the owner in fee and entitled to the possession. (*Id.*)
7. Where there has been no time, since the publication of the decree, when the assignee was required by the statute of bankruptcy to institute a suit against the purchaser at the mortgage sale, as an adverse claimant, he would not be barred by the limitations contained in that act, but may take possession of the premises, if vacant, or maintain an action for the recovery of their possession. (*Id.*)
8. A defendant who relies upon a discharge in bankruptcy in another country as a bar to the action, or on a certificate of a commissioner in bankruptcy, under the act of 7 and 8 *Vic.*, chapter 70, entitled "An act for facilitating arrangements between debtors and creditors," must set forth in his answer, 1. The statute under which the alleged proceedings were had and certificate granted, 2. Such prior proceedings as warranted the granting of the certificate, with particularity, besides pleading the certificate. (*Philippe* agt. *James*, 3 *Robt.* 720.)
9. If no certificate has been granted, but enough has been done to extinguish the plaintiff's cause of action, all the material facts relied upon as producing such extinguishment, or the defendant's

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actual discharge from liability by legal proceedings, must be pleaded. (*Id.*)

10. If the certificate has been granted, it must be pleaded, and other jurisdictional facts be alleged which, if true, authorize the granting of it. (*Id.*)
11. The answer, in such a case, to be sufficient, must set forth the nature of the proposal made by the defendant, on the presentation of his petition, to enable the court to see that it was a discharge from liability; and whether it was for the future payment of his debts, or for their compromise only, and not in the alternative; and must specifically allege that notice of a second meeting was given to the plaintiffs. A mere allegation of notice "to said creditors and their agents and solicitors," following a statement of the assent of a majority of creditors to the defendant's proposal, is insufficient. (*Id.*)
12. The purpose of the act being, as stated in its title, merely to "facilitate arrangements between creditors and debtors," not to discharge insolvents, no one can be entitled to a certificate under it until the final meeting of creditors and discharge of the temporary trustee, after the debtor's proposed compromise has been carried out. (*Id.*)

BANKS.

1. A bank upon which a check is drawn, having paid the same, cannot recover back the money from the person to whom it was paid, although the check prove a forgery. (*National Bank of Commonwealth* agt. *Grocers' National Bank*, ante, 412.)
2. The loss under such circumstances should fall on the bank upon which the check was drawn. A bank should know the signature of its dealers. (*Id.*)
3. The right of a party ultimately to be affected is not concluded by what transpires at the *New York clearing house*, or the entries made there, in respect to a check which passes through it. The clearing house does not pass upon the genuineness of the paper. (*Id.*)
4. Payments involuntarily made may be recovered back, if the payment was in fact improper. (*Id.*)
5. An order to show cause issued against a bank is properly served upon its vice-president, especially where it appears that he is also a director, which perhaps might be presumed from his office of

vice-president. (*People* agt. *Central City Bank*, ante, 428).

6. Where two receivers, appointed to wind up the affairs of an insolvent bank, are appointed on the same day, and both claiming the assets of the bank and the right to act, one of them being in actual possession, the court, on the application of the other receiver for the removal of the one in possession, and for possession, must regard it as a question of legal priority, and of course must take notice of the fractions of the day upon which such appointments were made. (*Id.*)
7. The mere preparation and verification of papers for an application for the appointment of a receiver, &c., cannot determine the question of priority. (*Id.*)
8. Where one of the two applications for the appointment of a receiver—both made on the same day, before different justices, in different judicial districts—obtained the first judicial action by service of papers, of the first granting the order, of the first perfecting of the appointment, by the execution, approval and filing of the required bond it took precedence of the other, notwithstanding the latter receiver first took actual possession of the property and assets of the bank. (*Id.*)
9. The provisions of the Revised Statutes (2 R. S. 461), entitled "Of proceedings against corporations, in equity," are not repealed or abolished by chapter 226 of the laws of 1849 (*See Laws 1849, p. 340*), entitled, "An act to enforce the responsibility of stockholders in certain banking corporations and associations, as prescribed by the constitution, and to provide for the prompt payment of demands against such corporations and associations." (*Id.*)
10. Therefore, under the Revised Statutes, proceedings may still be instituted by the people, through their attorney general, for the dissolution of a moneyed corporation and the appointment of a receiver to wind up its affairs. This valuable right was not intended to be in any wise impaired by the act of 1849. So far as this question is concerned, they do not necessarily conflict, and may well stand together. (*Id.*)
11. A bank, with whom assignees in trust for the benefit of creditors have deposited, as such, moneys which are proceeds of the assigned property, cannot, generally, in an action by the depositors to recover such moneys, set off a claim it has against the assignors of

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the plaintiffs. (*Lawrence* agt. *The Bank of the Republic*, 3 Robt. 142.)

12. But if such bank be a judgment creditor of the assignors of the plaintiffs, and has exhausted its remedy against them by execution, it becomes thereby entitled to attack the validity of the assignment, and may, in an action by the assignees to recover the proceeds of the assigned property deposited with it, set up, by way of *counter claim*, the invalidity of such assignment, by showing it to be fraudulent as against creditors, and their right to be paid out of the proceeds of the assigned property while in the hands of the assignees. (*Id.*)

13. The equitable right of the bank to have the proceeds of the assigned property applied in satisfaction of its judgment, is so immediately connected with the *subject* of the action that it constitutes the materials of a *counter claim*, within the meaning of the Code; and it is erroneous to exclude evidence of such defense. (*Id.*)

14. After an assignment of bank stock has been executed by the owner to another, the bank, upon the application of the purchaser, is bound to allow the transfer to be made upon its books, and to issue a new certificate to him, unless restrained from so doing by an order of a court of competent jurisdiction. (*Purchase* agt. *The New York Exchange Bank*, 3 Robt. 164.)

15. A demand that the transfer be made, is notice to the bank that the assignee is the owner of the stock, and from that time it is bound to respect his rights. (*Id.*)

16. But if, at the time the demand is made, there is an order of a court of competent jurisdiction in force, restraining the bank from making any transfer or other disposition of the stock, that is a sufficient reason for refusing to make the transfer. (*Id.*)

17. After notice to the bank of the assignee's ownership, all that a receiver of the original holder could sell, and all that a purchaser from him could acquire, would be the interest the assignor had, and that would be nothing, after his transfer of the stock to the assignee. (*Id.*)

BILL OF PARTICULARS.

1. Assuming the court to have the power to order a bill of particulars, after the issues in a cause have been referred to a referee to hear and determine, it will

not be exercised to interrupt a trial actually proceeding before him. (*Cutwell* agt. *Goodenough*, 3 Robt. 633.)

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. A bill of exchange, drawn and accepted, "payable in United States gold coin," must be paid in gold, or its *equivalent*, if paid in legal tender notes. (*Bank of Prince Edward's Island* agt. *Trumbull*, ante, 8.)

2. We have two standards of value recognized by law, the one gold and silver, the other paper; either is a legal tender for a debt, and a contract which calls for payment in gold calls for payment in a currency recognized by law, and there is nothing in law or in reason which forbids the parties from making such agreement; and when it is manifest that it was the intention of the parties that payment should be made in coin instead of paper, it is the duty of the courts to carry into effect such intention. (*Id.*)

3. An *express company* that agrees to take a promissory note to collect, and if not paid on presentation at the proper place, to have it *protested*, but neglects to cause it to be protested, are liable for the amount of the note, where there is no sufficient evidence of a waiver of notice of non-payment, and notice of protest by the indorsers, who are discharged, and it appears that the maker is insolvent. (*Coghlan* agt. *Dinsmore*, ante, 416.)

4. An *estoppel in pais* may be urged against the *defense of usury*. And this estoppel is as applicable to an indorser of an accommodation promissory note, who represents that the note is valid business paper, as to the maker of the note. (*Mason* agt. *Anthony*, ante, 477.)

5. A waiver of protest of accommodation notes passed away after they became due, by the person for whose accommodation they were indorsed, in satisfaction of a previous debt owing by such person to the transferee, made by a memorandum above the indorser's name, is a waiver of a demand also. And the indorser's undertaking, instead of being conditional, becomes thereby as absolute as if he were a joint maker. (*Harrington* agt. *Dorr*, 3 Robt. 275.)

6. A note past due may be negotiated; and a party who lends his note, without limitation as to the time of its use, is not presumed in law to have limited such time to the period prior to its maturity. (*Id.*)

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7. The fact that the indorser of a note appears to be a surety, only affects the question of indulgence to or discharge of the maker. The law may imply the condition of a reasonable time in the negotiation of a note, without necessarily restricting such time to that before its maturity. (*Id.*)
8. Waiver of demand and notice, by an accommodation indorser, leaves him absolutely liable for the payment of the note, as much as though he were a joint and several maker by writing his name under the maker's with the word "surety" subjoined. And his liability must be determined upon the same principle as if he were the accommodation joint maker of the note. (*Id.*)
9. Any presumption, arising from the form of the obligation, when a party is an ordinary indorser, and thereby supposed to limit its use to the period before maturity, because his contract is conditional, fails when, by waiving demand, he makes his contract absolute. (*Id.*)
10. In an action upon a promissory note, brought by a person who is not a *bona fide* holder thereof, he having assumed no liability nor parted with anything as a consideration for the delivery of the note to him, any defense which could have been interposed by the defendant to the note in the hands of the payee is available to such defendant. (*Van Valkenburgh* agt. *Stupplebeen*, 49 Barb. 99.)
11. Under the provision of the Code allowing a defendant to plead and sustain by evidence any defense, legal or equitable, which he may have, the defendant in such an action may set up as a defense, and prove, a verbal agreement accompanying and qualifying the delivery of the note, in connection with a subsequent surrender of property to and acceptance thereof by the payee, upon which a surrender of the note, while in the hands of the payee, would have been compelled, in equity, before the Code. (*Id.*)
12. Otherwise, if the note had been transferred, before maturity, to a *bona fide* holder. (*Id.*)
13. An instrument signed by four persons, by which they, six months after date, for value received, with use, jointly and severally promise to pay a person named, or bearer, the sums set opposite their names, for and in consideration of the right to make, use and vend a patent right in a specified district, is, in legal effect, a promissory note. (*Ballard* agt. *Burnside*, 49 Barb. 102.)
14. Each signer is jointly and severally liable for the whole amount subscribed, and the only effect of subdivision of amounts opposite each name is to determine their rights between themselves. It amounts to nothing as between the makers and the payee or bearer. (*Id.*)
15. Such an instrument is not to be construed as containing four separate contracts, requiring a five cent internal revenue stamp for each, but is sufficiently stamped if a ten cent stamp be attached. (*Id.*)
16. Even assuming that such an instrument contains four several agreements, it may be held good as to either of the signers, if offered in evidence on the trial, against him alone. (*Id.*)
17. Where an accommodation note not restricted as to the mode of its use, by the lender, has been transferred to pay or secure a precedent debt, the holder may recover, because the note has answered the purpose for which it was created, and the maker is to be considered as consenting to any use which operates to the benefit of the borrower. (*Schep* agt. *Carpenter*, 49 Barb. 542.)
18. The rule is otherwise where the note has been obtained by fraud, or was given for a specific purpose, or is void in the hands of the payee, on grounds of public policy, or otherwise. In such a case a precedent debt is not a consideration for a transfer of the note which will entitle the holder to recover. (*Id.*)
19. The surrender to a party of his own negotiable note past due, and taking in lieu thereof a negotiable note before its maturity, is a sufficient parting with value to constitute the party a *bona fide* holder of the latter note. (*Pratt* agt. *Coman*, 37 N. Y. R. 440.)
20. Where one standing in the character of second indorser upon commercial paper is not made liable at the maturity and non-payment of the note, no act or indorsement of the payee, subsequent to the maturity of the note, can render the second indorser liable. (*Bacon* agt. *Burnham*, 37 N. Y. R. 614.)
21. Where, upon the face of the note, it appears that a party indorsing it stands in the relation of second indorser, it matters not whether the payee write his name above or below such indorser, he must be deemed to be first indorser, and one upon whose credit the second indorser wrote his name. (*Id.*)
22. Where a prior indorser cannot re-

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cover against a subsequent indorser, no person deriving title under such prior indorser, with knowledge of the facts, can do so. (*Id.*)

23. *It seems*, that, where a promissory note specifies no place for payment, a demand of payment must be made personally of the maker, at his dwelling house or place of business, if that can be found. (*Holtz agt. Boppe, 37 N. Y. R. 634.*)

24. The rule requiring a demand of payment to be made personally upon the maker, at his residence or place of business, is satisfied if due and reasonable diligence is used to ascertain such residence or place of business without success; and the note may then be protested for non-payment, so as to charge indorsers. (*Id.*)

BOARD OF AUDIT.

1. None of the expenses of the board of audit for the city and county of New York, and none of the claims covered by it, can be paid, except out of a fund directed by the act creating the board (1867) to be raised for that purpose by the board of supervisors, by tax. (*Sherwood agt. Connolly, ante, 124.*)

2. So long as the supervisors refuse to raise such fund, no damage can ensue to any tax payer, and he is not entitled to an injunction to restrain the action of the board of audit, even assuming the act under which they were created to be unconstitutional. (*Id.*)

3. There is no remedy given under the provisions of section 3, chapter 405 of the laws of 1864, against such a body as a board of audit. (*Id.*)

4. That section only gives a remedy in behalf of a tax payer, a member of the common council or a supervisor, against the common council or the supervisors. (*Id.*)

BOARD OF HEALTH.

1. The ninth section of "An act relating to the metropolitan board of health, and to the duties and powers of the commissioners of said board and the salaries of their subordinates, passed in 1867, provides as follows: "No preliminary injunction shall be granted against the metropolitan board of health, or of police, or its or their officers, or against the commissioners of said board in their capacity as a board of excise, or against the last named board, except by the supreme court, at a special or gene-

ral term thereof, after service of at least eight days' notice of a motion for such injunction, together with copies of the papers on which the motion for such injunction is to be made." (*Burnham agt. Acton, ante, 48.*)

2. *Held*, that this is a public, and not a private or local law, and, therefore, not exposed to the constitutional objection of containing other subjects than those expressed in its title. (*Id.*)

3. The act creating the metropolitan sanitary district is, essentially, a penal law, and therefore is a public act. (*Id.*)

4. This act of 1867, being constitutionally valid, it deprives this court of jurisdiction to hear any motion for an injunction against the boards and officers named in it. (*Id.*)

5. The defendants, by an entry upon their records, declared that the premises of the plaintiff, and the business pursuits therein conducted, in their opinion, and in fact, were in a condition dangerous to life and health, and a public nuisance, and ordered that the business of slaughtering animals on the said premises be abated and discontinued, &c. The order was directed to be served as required by law, and executed by the board of metropolitan police. The defendants subsequently passed another ordinance, declaring that the slaughtering of animals should not be permitted or conducted, after the 15th of June, 1867, at any place in the city of New York south of Forty-second street; nor at any place north of that street, nor in the city of Brooklyn, without a special written permit. The evidence showed that the plaintiff's premises were well sewered, and the business of slaughtering was conducted there by the plaintiff with the greatest care and cleanliness it was capable of, and that it was not, in this case, in fact a nuisance; and nearly all of the neighbors of the plaintiff, for a considerable distance, united in declaring, in writing, that the premises were not offensive, annoying or prejudicial to health, and in requesting the defendants not to interfere with the plaintiff in the prosecution of his business. The evidence also proved, as a fact, that the slaughtering of animals could be so regulated and conducted as not to be in any case a nuisance, or prejudicial to public health. *Held*, that the defendants were clearly exceeding any authority conferred upon them by the laws, in attempting to declare anything to be a nuisance which is not such by the common law; and that they should be restrained by injunction from enforcing the said ordinance against

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the plaintiff, as the proprietor of a nuisance, and, until the hearing and disposition of the case, from interfering with his business, except for police inspection and regulation. (*Schnuster agt. The Metropolitan Board of Health, 49 Barb. 450.*)

6. While the inspection and regulation of pursuits in a large city, which are liable to become injurious to the public health and safety, are within the police powers lawfully delegated to and exercised by local and municipal corporations, the power to suppress such pursuits, when they have been immemorably exercised, is wholly beyond and above the police powers, and extends into the domain of legislative function. (*Per LEONARD, J.*) (*Id.*)

7. The metropolitan board of health, holding office by the appointment of the governor, and not being elected by the people of the city of New York, nor appointed by any power so elected, are not officers holding from a source permitting the exercise of local legislation to be conferred on them. (*Id.*)

BOARDING HOUSE LIEN.

1. The statute of April, 1860 (*Sess. Laws 1860, ch. 446, p. 771*) only gives the keeper of a boarding house a lien upon and right to detain the baggage and effects of a boarder for the amount which may be due by him, to the same extent and in the same manner as innkeepers have them. (*Shafer agt. Guest, ante, 184.*)
2. Thus limiting the lien to that for board actually due, and not including board to become due under an agreement to board in future. (*Id.*)
3. Nor can the act be extended to any other indebtedness, nor to any demand not due at the time of the detention. (*Id.*)

BOND AND MORTGAGE.

1. Where there is a contract for the sale and purchase of land, and a bond and mortgage is given upon other property to secure a part of the purchase money, and where possession of the land is taken under the contract of purchase, and partial payments on the bond are made, a surrender and cancellation, by the parties, of the principal contract, and a restoration of possession to the vendor, works a satisfaction of the bond and mortgage, where there is no agreement between the parties to the con-

trary. (*Eveland agt. Wheeler, 37 N. Y. R. 244.*)

2. The surrender to a party of his own negotiable note past due, and taking in lieu thereof a negotiable note before its maturity, is a sufficient parting with value to constitute the party a bona fide holder of the latter note. (*Pratt agt. Coman, 37 N. Y. R. 440.*)

BOUNDARY.

1. A deed bounded on a highway *prima facie* carries the title of the grantee to the center of the road, on the assumption that the grantor owned it. But if it appear to have been owned by another, the terms of the deed are satisfied by a title extending only to the roadside. (*Dunham agt. Williams, 37 N. Y. R. 251.*)
2. Where the land covered by the road-bed belonged to the government, and not to the owners of adjacent lands, as in the case of the ancient road from Flatbush to Brooklyn, a deed bounding lands upon such highway carries title only to the roadside. (*Id.*)

BOUNTIES TO VOLUNTEERS.

1. The first seven sections of the act of 1865, chapter 29, providing for state bounties to volunteers in the army and navy, &c., the 3d and 4th sections of which provide for and prohibit a sum not exceeding \$600 to be paid for each three years volunteer, became a law and took effect immediately on its passage. Feb. 10th, 1865, as declared in the act, and continued in force, notwithstanding the provisions of chapter 41 (*Laws of 1865*), passed on the 24th February, 1865, which re-enacted the same seven sections contained in chapter 29, and declared, "this act is hereby declared to be a law from the time of its passage; but it shall not take effect until after the canvass of the votes by the board of state canvassers next after the general (next November) election." (*INGRAHAM, J., dissenting.*) (*Powers agt. Shepard, ante, 53.*)
2. Consequently, an agreement made on the 21st of March, 1865, to pay \$830 for each of such volunteers for three years, is void, as being in violation of chapter 29. (*Id.*)
3. The fourth section of said chapter 29, prohibiting a larger sum than \$600 to be paid for the three years volunteers, is not unconstitutional. (*Overruling the decision S. C. at special term, 30 How. 8.*) (*Id.*)

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BROOKLYN CITY.

1. Where it is doubtful whether a person in whose favor a warrant is drawn upon the treasurer of the city of Brooklyn, by the comptroller, is entitled to the money, there being another claimant, who has sued the city therefor, the mayor is not obliged to sign the warrant, and cannot be compelled to do so by mandamus. (*The People ex rel. Duff agt. Booth*, 3 Robt. 31.)
2. There is nothing in the charter of the city, or in the general statutes of the state, authorizing the comptroller to adjudicate a question of title to the money, in such a case; and the mayor is not controlled by his action, and bound to sign the warrant as a mere ministerial act. (*Id.*)

CANAL CONTRACTOR.

1. A defendant, as contractor for repairs upon the canal, and legally bound to keep the same free from all obstructions to navigation, is liable for damages occasioned by negligently permitting obstructions to the navigation of the canal to continue. (*Fulton Fire Ins. Co. agt. Baldwin*, 37 N. Y. R. 648.)
2. Such cause of action is assignable, and the assignee can recover for the same in his own name. (*Id.*)
3. In an action brought by a corporation, on a demurrer to the complaint, stating for cause that the complaint does not state facts sufficient to constitute a cause of action, the defendant cannot object that the plaintiffs, not being incorporated, have not capacity to sue. (*Id.*)
4. To avail himself of such an objection, it should have been specifically set forth as a cause of demurrer. (*Id.*)

CARRIERS.

1. It is not sufficient to charge the defendant, as common carrier, to prove that he was the owner of a sloop, and was specially employed by plaintiffs to make a trip for a load of grain, for which he was to receive a certain sum of money. (*Allen agt. Sackrider*, 37 N. Y. R. 341.)
2. When the defendant is employed as a special carrier to transport grain, he is bound only to the exercise of ordinary care, skill or foresight, in the execution of his contract. (*Id.*)
3. Difference between a common and spe-

cial carrier defined by PARKER, J. (*Id.*)

4. A common carrier, who has contracted to carry goods to a specified point, is not justified in storing the goods at an intermediate point, because he considers the further carriage thereof would be unsafe. (*Van Winkle agt. The Adams Express Company*, 3 Robt. 59.)
5. If he has any doubts about the safety of any portion of the route, he should inform the consignor thereof, and notify him that, unless the goods are called for at an intermediate point, he will store them there. (*Id.*)
6. A person holding himself out to the world as a carrier to a certain place, whose custom it is to carry goods to that place, who tells a consignor and his agent that he carries to that point, and charges freight thus far, is liable for any neglect to carry the goods the whole distance, unless he expressly limits his liability to an intermediate point at the time. (*Id.*)
7. Where a package sent by express was marked "C. O. D. \$292," held, that this was ample notice to the express company of the value of the package, to enable the owner to recover beyond the extent of \$50, as limited in its receipt. (*Id.*)
8. Common carriers of goods may, by express stipulation, limit their liability for the loss of goods occurring from even the negligence of their agents and servants, or wholly exempt themselves from such liability; and the acceptance by the bailor from the bailee, in the ordinary course of business, of a receipt for the goods containing such a stipulation, creates a binding contract. But the liability of the carrier will continue, as established by the common law, in respect to all matters not expressly stipulated against. (*Prentiss agt. Decker*, 49 Barb. 21.)
9. The putting into the hands of a passenger, on receiving her baggage for delivery at her residence, of a card containing a clause limiting the liability of the carrier to a specified amount, except by special agreement, to be noted on such card, will not, without further proof from which the assent of such passenger to the terms thereof may be implied, establish such a contract. (*Id.*)
10. Such a contract relates only to the carrier's liability as an insurer of the goods, and imparts no exemption from liability for actual negligence; and it applies only to deliveries to railroads

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and steamboats. The legal title to wearing apparel and jewelry, provided by a father for the use of his infant daughter, remains in him, notwithstanding the possession of them by the infant. And for the purposes of an action by the father against a common carrier, to recover for the loss of such property, the daughter must be treated as the legally constituted agent of the plaintiff. (*Id.*)

11. A common carrier cannot limit his liability by a memorandum or note on the card or ticket which he delivers on the receipt of goods to be transported by him. (*Limburger agt. Westcott*, 49 Barb. 283.)
12. Thus, where, by a memorandum on a receipt for baggage, issued by an express company, it was stated that the "liability" of the company was "limited to \$100. except by special agreement to be noted" thereon; *Held*, that, in the absence of any knowledge by the owner of the baggage of such condition, there was no consent to it by him, and no bargain between the parties, limiting the liability of the company. (*Id.*)

CASES REVIEWED.

1. The decision in *Richardson agt. Abendroth* (43 Barb. 162) approved. (*Williams agt. Wadsworth*, 49 Barb. 291.)
2. *Aiken agt. Wasson* (24 N. Y. R. 482) distinguished from the present case. (*Id.*)
3. The case of *Davis agt. Spencer* (24 N. Y. R. 386) commented on and distinguished. (*Brand agt. Brand*, 49 Barb. 346.)
4. The decision in *The People agt. The Board of Metropolitan Police* (33 How. Pr. 52, 48 Barb. 524) approved. (*Schuster agt. The Metropolitan Board of Health*, 49 Barb. 450.)
5. The rule as to the effect of former actions as a bar, laid down in *Phillips agt. Berick* (16 John. 140), approved. (*McIntosh agt. Lown*, 49 Barb. 550.)
6. The cases of *Brady agt. Mayor, &c., of New York* (2 Bosw. 173; S. C. 20 N. Y. R. 312), and *McSpedon agt. The Same* (7 Bosw. 601), commented on, and their authority as to restrictions on the defendants in making contracts doubted. (*Per ROBERTSON, Ch. J.*) (*The Harlem Gas Light Co. agt. The Mayor, &c. of New York*, 3 Robt. 100.)
7. The case of *Wetmore agt. Kussam* (3 Bosw. 321) commented on and distinguished. (*McIlvaine agt. Kadel*, 3 Robt. 429.)
8. The case of *Williamson agt. Berry* (5 How. U. S. R. 495) commented on, and disapproved. (*The Madison Avenue Baptist Church agt. The Baptist Church in Oliver Street*, 3 Robt. 570.)

CAUSE OF ACTION.

1. An indorser who pays the amount of a note to a holder, under a mistaken belief, founded on statements of the holder that he, the indorser, has been duly charged, or that a prior indorser has been, may, on discovering that he was not so charged, maintain an action to recover back the amount paid. (*Lake agt. Artisans' Bank*, 3 Abb. N. S. 209.)
2. To constitute a payment voluntary, within the rule that a voluntary payment cannot be recovered back, it must be made with a full knowledge of all material facts. (*Id.*)
3. The fact that a plaintiff suffers a loss of profits in his trade, by a competition in business set up by the defendant, cannot, ordinarily, be regarded as constituting special damage, such as will sustain an action. (*Masterson agt. Short*, 3 Abb. N. S. 151.)
4. An action is not maintainable, under the statutes of this state, against a married woman, to recover for articles sold to her, when she is not engaged in carrying on any trade or business, and has no separate estate. (*Schmitt agt. Costa*, 3 Abb. N. S. 188.)
5. In an action by one claiming under the grantor in a perpetual lease made subject to a rent charge, brought to recover possession of the premises, upon the ground of a breach of the condition to pay the rent, where the defendant claims an extinguishment of the rent charge by a technical legal merger, the plaintiff may rebut that defense by showing that in equity no merger has taken place. (*Sheehan agt. Hamilton*, 3 Abb. N. S. 197.)
6. It is not necessary, under the Code of Procedure, in such a case, that the plaintiff should resort to a separate action of an equity nature, to have the existence of the rent charge declared. The whole merits of the controversy may be tried in the action to recover possession of the land for the non-payment of the rent, notwithstanding the facts relating to the alleged merger would have been, before the Code, of equitable cognizance. (*Id.*)
7. An action for the breach of a covenant

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upon the part of a lessee that he will make repairs during the term of the lease, or upon a covenant that he will not make alterations in the leased premises without the consent of the lessor, may be maintained by the lessor, without awaiting the expiration of the lease. (*Webster agt. Nasser*, 3 Abb. N. S. 39.)

8. It seems, that an action may be maintained against a telegraph company by the receiver of a message, for indemnity for a liability incurred by him in consequence of an error occurring in the message, through the fault of the company in transmitting it; such right of action being founded, not on contract, but on the misfeasance of the company, and their consequent liability for the natural and proximate consequences of their neglect. (*Rose agt. United States Telegraph Co.* 3 Abb. N. S. 408.)

9. But such action can only be incurred by one who has in his own right incurred the liability for which he seeks reimbursement. It does not lie in behalf of one who acted as mere agent, and has voluntarily paid a demand for which his principal, and not he, was liable. (*Id.*)

CENTRAL PARK.

1. The act of 1865, so far as it authorizes the commissioners of the Central Park, instead of the common council of the city of New York, to make an application to this court for the opening of a road or public drive above Fifty-ninth street, is not unconstitutional, whatever may be considered as to the validity of some other portions of that act. (*Matter of Commissioners of Central Park, ante*, 255.)

2. The authority conferred on the commissioners to make such application is not that of any local officer, nor does it authorize them to discharge the duties of any office, but provides for the discharge of a mere ministerial act. (*Id.*)

3. The common council of the city of New York never had authority, since 1807, to lay out any streets or public places in that part of the city which was embraced in the map of the commissioners filed under the act of 1807. Their power was below the limits embraced in that map. (*Id.*)

4. The act of 1813 expressly limited their powers to that part of the city not laid out by virtue of the act of 1807. They had no authority to lay out or open any streets or public places but such as were provided for on the said map. (*Id.*)

5. The authority conferred by the legislature upon the commissioners of the Central Park, to make application to lay out a road or public drive between the northerly line of Fifty-ninth street and the southerly line of One Hundred and Fifty-fifth street, did not in any way interfere with the authority previously bestowed upon the common council. (*Id.*)

6. The legislature might have laid out this drive mentioned in the act, and having the power, they might authorize others to do it. (*Id.*)

7. A mere error of judgment of the commissioners in the valuation of property taken for such purpose is not the subject of review on a motion to confirm their report, unless the sum allowed was grossly inadequate and unequal as compared with other valuations, or unless some wrong principle was adopted as to the amount allowed. (*Id.*)

8. This act of 1865 does not authorize the taking of any land by the commissioners not required for the drive or road, which the act provides shall be of an uniform width, and is described in the notice required to be given by the commissioners as follows: "Said road or public drive is of a general width of one hundred and fifty feet, as shown on a certain map," &c. (*Id.*)

9. Held, therefore, that the commissioners had no jurisdiction to take gores of land outside of said road or drive, and so far as such gores are included in these proceedings, they are erroneously taken. (*Id.*)

CERTIORARI.

1. The office of a certiorari is to bring up the record of the proceedings sought to be reviewed; and it is properly directed to the officer or body having the legal custody thereof. (*The People ex rel. Reynolds agt. The City of Brooklyn*, 49 Barb. 136.)

2. Where the return of a city corporation to a writ of certiorari to remove proceedings for the widening of a street shows that the report of the commissioners, annexed thereto, contains a recital of the proceedings by which they were appointed, or a certified copy of such proceedings is appended thereto, the petition for the appointment of commissioners, and the order appointing them, form constituent parts of a single record, which is legally in the custody of the city corporation; and they are, by the return of such corporation, brought before the court, as fully and

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directly as any other part of the same record. (*Id.*)

3. Any error in the direction of a writ of certiorari, or in the return thereto, must be corrected by motion. All objection on the ground of such irregularities is waived by submitting to a hearing on its merits. (*Id.*)
4. Where assessors have jurisdiction of the person of the plaintiff, and of the subject matter of taxation, although their assessment may be erroneous, it is not void, and can be corrected only by an appropriate proceeding for such purpose, and does not lay the foundation for an action at law to redress the alleged injury. (*Swift* agt. *City of Poughkeepsie*, 37 N. Y. R. 511.)
5. The remedy in such cases may be by writ of error or certiorari, to have the assessment roll corrected. (*Per MILLER, J.*) (*Id.*)

CERTIFICATES OF INDEBTEDNESS.

1. Certificates of indebtedness issued by the United States, under act of March 1, 1862, are not exempt from state taxation. (*People, etc.* agt. *Hoffman*, 37 N. Y. R. 9.)
2. They are mere acknowledgments of pre-existing indebtedness, and not instrumentalities of government, etc. (*Id.*)

CHAMPERTY.

1. A deed of lands held in adverse possession is good as against the grantor and his heirs, and against strangers, though void as against the party in possession; and, being void as to the latter, an action will lie against him in the name of the grantor, notwithstanding such deed, but not in the name of the grantee. A recovery therein will, however, inure to the benefit of such grantee as is to limit the operation of the section as previously enacted, not to create any new authority, as between the grantor and grantee, for the use of the name of the former by the latter. (*Hamilton* agt. *Wright*, 37 N. Y. R. 502.)

CHATTEL MORTGAGE.

1. The provisions of the statute requiring the filing of a copy of a chattel mortgage and statement, etc., after one year from the filing of the original mortgage, in the office of the clerk of the town where the mortgagor then resides, can-

not be complied with, where the mortgagor has become a non-resident of the state within the year. (*Dillingham* agt. *Bolt*, 37 N. Y. R. 198.)

2. A bona fide purchaser of such chattels after the expiration of the year acquires a title superior to the lien of the mortgage. (*Id.*)
3. It seems that a chattel mortgage, unless renewed from time to time, by filing copies thereof, as required by law, is of no avail as against the claim of one who acquires a lien upon the property by virtue of a subsequent mortgage, though it be with notice of the former. (*Jones* agt. *Howell*, 3 Robt. 438.)
4. The latter clause of the provision of the internal revenue act of the United States, authorizing the collector to allow stamps to be affixed to mortgages, when they have been omitted without intent to evade the provisions of that act, or to defraud the government, but declaring that "no right acquired in good faith before the stamping of such instrument * * * and the recording thereof, if such record be required by law, shall in any manner be affected by such stamping," &c., does not apply to chattel mortgages, inasmuch as it contemplates mortgages which require to be recorded. (*Vail* agt. *Knapp*, 49 Barb. 299.)
5. Chattel mortgages are merely filed, and an entry made in a book kept by the clerk of the names of the parties, the amount secured, the date, time of filing, and when due. This cannot be regarded, in any proper sense, as recording a mortgage. (*Id.*)
6. The statute is highly penal, and should not, even in a doubtful case, receive a construction which would invalidate the security. (*Id.*)
7. Under the provision of schedule "B" of the revenue act, specifying among the instruments which require to be stamped "mortgage of lands, estate or property, real or personal, heritable or movable, whatsoever, where the same shall be made as a security for the payment of any definite and certain sum of money lent at the time, or previously due and owing, or forborne to be paid, being payable," no stamp is necessary upon mortgages executed to secure the mortgagees as drawers and indorsers of drafts drawn for the benefit of the mortgagors, and payable subsequent to the execution of such mortgages, where no money was lent at the time, nor had any become due and owing, nor was

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any forborne to be paid, *being payable*. (*Id.*)

CHECKS.

1. *Checks* drawn in the ordinary general form, not describing any particular fund or using any words of transfer of the whole or any part of the account standing to the credit of the drawer in the bank upon which they are drawn, but containing only the usual request directed to the bank, to pay to the order of the payee named a certain sum of money, are of the same legal effect as inland bills of exchange, and do not amount to an assignment of the funds of the drawer in the bank. (*Lunt* agt. *The Bank of North America*, 49 Barb. 221.)
2. There is no liability of the party upon whom such an instrument is drawn until after it is accepted; and, until payment or acceptance, it is always revocable by the drawer. (*Id.*)

CHURCH ELECTIONS.

1. Under the provisions of the statute for the election of wardens and vestrymen in the Protestant Episcopal church in this state, the rector is made both the presiding and returning officer, and his certificate of election furnishes presumptive evidence of the right of the party receiving it to hold the office and exercise its functions. (*People* agt. *Lacosta*, 37 N. Y. R. 192.)
2. In an action in the nature of a *quo warranto* brought against persons so elected, according to the certificate of the rector, it is incumbent on those containing their election to establish by affirmative evidence that, at the election, themselves, instead of the defendants, were duly elected. (*Id.*)
3. The opinion of a witness that most of the voters voting for the defendants were not legal voters, furnishes no evidence of their disqualifications, even though the answer be given in reply to a question propounded by the trying court. The court has no authority to propound improper questions to a witness against the objection of counsel; and if it do, its action will be corrected on appeal. (*Id.*)

CLAIM AND DELIVERY.

1. If the defendants, in an action for claim and delivery, claim the benefits of the purchase of the property, which it is alleged was made by their agent

fraudulently, although they allege a want of knowledge of such fraudulent purchase, they thereby indorse the agency. (*Tracy* agt. *Veeder*, ante, 209.)

2. Every ratification of an assumed agency is equivalent to an original authority. (*Id.*)
3. Where the plaintiffs institute proceedings for the claim and delivery of personal property, and thereby obtain a *portion of it*, they do not thereby waive an *order of arrest* against the defendants for the recovery of the remainder, or for damages for its detention, on the ground that the order of arrest must be applicable to the *entire cause of action*, and not to a part only; and that the plaintiff could not issue execution against the person of the defendants for the portion of the property in the plaintiffs' possession, and therefore could not issue such execution at all; and if not, an order of arrest would be equally improper. (*Id.*)
4. The delivery of a portion of the property to the plaintiffs under the proceedings in replevin is not decisive of their right to retain it. That question has yet to be decided in the action. If decided adversely to the plaintiffs, they must restore all they have thus acquired. If the plaintiffs succeed, they will have judgment for the delivery of so much of the property as they have not already received, or for its value, if not obtainable. (*Id.*)
5. Therefore, the execution can go for no larger amount than the defendants are really bound to pay, nor for anything or any amount for which an execution against the person may not legally issue. (*Id.*)
6. An action of *trotter* will not lie for the omission of a *common carrier* to deliver property, as where the property has been stolen or lost through negligence, and so cannot be delivered to the owner. The remedy is *assumpsit* or a *special action on the case*. (*McCunn*, J., dissenting: *Holding that section 69 of the Code has abolished all distinctions between the mere forms of actions, and every action is now a special action on the case.*) (*Tolano* agt. *Steam Navigation Co.* ante, 496.)

COMMISSIONERS OF TAXES.

1. The office of *commissioner of taxes* in the city of New York, as at present constituted, comprises the official duties and functions of officers existing at the time the constitution of 1846 was adopted, and which were then performed by

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ward assessors and the board of assessors of the city. (*People agt. Raymond, ante, 173.*)

2. The act of the legislature of 1867, vesting the appointment of these tax commissioners in the governor and senate, is unconstitutional and void. (*Id.*)
3. These commissioners of taxes are city officers, and must be elected or appointed in the mode the constitution provides, to wit: "by the electors of such city or of some division thereof, or appointed by such authorities thereof as the legislature shall designate for that purpose." (*Id.*)
4. The office of commissioner of taxes of the city of New York, as at present constituted, comprises the official duties and functions of officers existing at the time the constitution was adopted; and the act of the legislature, vesting their appointment in the governor, with the advice and consent of the senate, is unconstitutional. (*People agt. Raymond, 37 N. Y. R. 428.*)

COMMISSIONS.

1. Where the plaintiff, a real estate broker, had been employed by the defendant to sell or exchange for him certain real estate, a farm and four lots; the farm he would sell for \$5,000, or would exchange the whole for \$13,000; and agreed to pay plaintiff's commissions at the rate of two and a half per cent. After a purchaser had been introduced to defendant by the plaintiff, and some considerable delay at negotiations, at which the defendant became dissatisfied, and requested the plaintiff to find him another purchaser, but upon plaintiff's request negotiations were renewed, and an exchange finally made, but the defendant insisted that the purchaser should pay the plaintiff's commissions, which was agreed to by the plaintiff in a note to defendant, by the purchaser, as follows: "Mr. B. (the purchaser), has agreed to assume the payment of your commissions on the exchange of property between you. Therefore, whatever you do will be in consideration of that fact." "Mr. B.'s promise is satisfactory to me." (*McClave agt. Maynard, ante, 313.*)
2. Held, that evidence offered by the defendant at the time of the delivery of this note, under the question: "At the time you (the purchaser) received the letter from McClave (plaintiff), what was said between you?" should have been received, and it was error to exclude it; as the plaintiff claimed that the

amount of commissions fixed with B., the purchaser, was \$100, provided the valuation was \$5,000, as he represented it to be; when in fact the amount of the exchange was \$13,000. (*Id.*)

3. Any thing said by the plaintiff relating to the subject in controversy, was admissible, when offered by the defendant.

COMPLAINT.

1. An action may be maintained by a wife against her husband, to recover for wrongfully taking and converting to his own use money which was the separate property of the wife. (*Whitney agt. Whitney, 3 Abb. N. S. 350.*)
2. In such action the complaint is not open to objection because it demands judgment for the sum of money alleged to have been converted. A prayer for an accounting is not the only form of relief allowable. (*Id.*)
3. It is not a sufficient ground of demurrer to a complaint for libel that the article complained of does not name the plaintiff. (*Parker agt. Raymond, 3 Abb. N. 343.*)
4. Where the person intended by the libelous matter is not named, or is ambiguously mentioned, the proper facts may be averred and proved, to show that the plaintiff was the person intended. (*Id.*)
5. Upon such facts being proved, the question whether the plaintiff was the person intended by the article is a question of fact for the jury. A complaint, in such a case, is sufficient on demurrer, if it contains averments sufficiently certain to enable the jury to determine this question. (*Id.*)
6. A complaint was held, on demurrer, to be defective in substance, which alleged merely the following facts: That the plaintiffs sold to the defendants, by samples, a certain quantity (3,000 pairs) of merchandise (blankets), to be paid for within a certain time (30 days) after delivery. That the plaintiffs delivered about one-half of such merchandise. That some of it did not correspond with the samples, and that the plaintiffs, in consideration thereof, guaranteed it to be of a quality to pass inspection by the government, on purchase. That the defendants then agreed to receive such merchandise and pay for it, and, after a portion had been delivered, promised to pay the price, but afterwards announced their intention to return that part delivered. That the plaintiffs notified them that, if they did so, the plaintiffs

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would sell such merchandise to the government, and hold them responsible for any loss. That the defendants sent the merchandise to the plaintiffs, who sold the same to the government for the best price they could get, and rendered an account of the sales, showing the sum due and owing from the defendants, which still remained unpaid, and which the plaintiffs claimed to recover. (*Sutton* agt. *Cronin*, 3 *Robt.* 493.)

7. Such a return of the goods by the defendants could not constitute an assent by the plaintiffs to the terms of the notification, so as to form a contract binding on them. The latter could not, by such notice, compel the former to keep the goods or assent to its terms. (*Id.*)

8. Dates are always flexible, in a pleading; variances in that respect, between it and the proof, may be disregarded (*Code*, §§ 169, 170, 173, 176; and a pleading is hardly *demurrable*, now, for want of a time and place for every occurrence stated in it. A referee would not be entitled, therefore, to report against a fact, merely because its date was wrongly stated. (*Zorkowski* agt. *Zorkowski*, 3 *Robt.* 613.)

9. But in an action for an absolute divorce, for adultery, the complaint should allege that the discovery by the plaintiff of the defendant's criminality took place within a certain time before the commencement of the action; because, as it affects the propriety of decreeing a divorce, such time has been fixed by law, and the insertion of such an allegation in the complaint is required by an absolute rule. (*Id.*)

10. The discovery of such criminality more than five years before bringing suit, is made, by the Revised Statutes, a defense to the action; but the 163d rule of the late court of chancery required most of the matters constituting a defense under such statutes to be negatived by the complainant in his or her bill of complaint, to enable the court, by a reference to a master, to take proof of all the material facts stated therein, and report the testimony taken thereon, to ascertain whether the facts required to be denied existed or not. The 86th general rule of the supreme court, providing merely for the substitution of an affidavit by the complainant for his or her verification of the complaint, was not intended to accomplish the same purpose as the former rule, and does not repeal it (*Id.*)

11. Although a complaint, in addition to alleging a sale by the plaintiffs, by virtue of a power in a will, of several lots

of land to the defendant, at public auction, his payment of ten per cent of the purchase money, and failure to pay the residue, a tender of a conveyance to him and demand of such residue, also alleged that the defendant, having refused to pay such residue, on the ground of a defect in the title, the question of its validity was submitted to an arbitrator, the defendant agreeing to pay the unpaid residue of the purchase money, with interest, and the arbitrator's fees, in case he should decide such title to be good, and the plaintiffs agreeing to repay the defendant the sum paid by him, with interest, and such arbitrator's fees, in case he should decide the title not to be legal, and that such arbitrator decided that the title was good. *Held*, on demurrer, that the complaint stated but one cause of action, which was a good one, upon the award. (*Denham* agt. *Stilwell*, 3 *Robt.* 653.)

12. At common law, a suit was maintainable, in equity, by a wife against her husband, to recover money, the separate property of the wife, which he had wrongfully taken and converted. And the Code having abolished the distinctions between equitable actions and actions at law, and the old forms of pleadings, a complaint setting forth such a state of facts, and praying judgment against the defendant for the amount taken by him and converted to his own use, states a good cause of action, and is therefore not demurrable. (*HOGEBOM, J., dissented.*) (*Whitney* agt. *Whitney*, 49 *Barb.* 319.)

13. It is no objection to the complaint, in such a case, that a money judgment is demanded, instead of an accounting. (*Id.*)

14. Whatever the prayer for relief may be, the judgment of the court will be according to the facts alleged and proved. And even if the party err in the nature of the relief demanded, the court will grant it according to the facts proved. (*Id.*)

15. The objection that the complaint does not state facts sufficient to constitute a cause of action may be taken at any stage of the proceedings; and a motion before the referee, to dismiss the action for such cause, is proper. (*Coffin* agt. *Reynolds*, 37 *N. Y. B.* 640.)

16. The secretary of a corporation organized under the law of 1848, chapter 40, is not a laborer, servant or apprentice of the corporation, within the meaning of the eighteenth section of said act. (*Id.*)

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17. In an action brought by the secretary of such corporation against the stockholders of the same for his services as secretary, an averment in the complaint that the action is for a debt claimed to be due to the plaintiff for services performed by him for the company as "secretary and otherwise," does not state a cause of action. (*Id.*)

CONFEDERATE AUTHORITY.

1. The clause in a marine policy of insurance, assuming the perils of men-of-war, pirates, rovers, arrests, restraints, detainers, etc., is qualified by the clause in the margin, "warranted free from loss or expense arising from capture, seizure or detention, or the consequences of any attempt thereof." The last statement is a warranty on the part of the assured. (*Swixerton agt. Columbia Ins. Co.* 37 N. Y. R. 174.)

2. The capture of a vessel by authority of the Confederate States, during the late rebellion, is within this warranty, and relieves the insurer from liability. (*Id.*)

3. On a trial, where the insurance company showed that the insured vessel, while lying at a wharf in the port of Norfolk, Virginia, for repairs, was, on the 21st of April, 1861, seized by a large body of men, professing to act by the authority of the state of Virginia, filled with stones, towed out into the channel, with the cheers of the populace, sunk at the mouth of the channel, to prevent the ingress or egress of vessels of war; that it was a time of great confusion and excitement; that no relief could be obtained from the courts, and that the vessel was lost; *held*:

4. (1.) That upon these facts, in connection with the history of the times, it should have been left to the jury, as a question of fact, whether the seizure of the vessel was an act of war, on the part of those then engaged in carrying out existing or co-acted acts of war by the state of Virginia, or whether it was the act of a rebel. (*Id.*)

5. (2.) That the Virginia ordinance of secession, adopted on the 17th of April, 1861, should have been received as evidence on the question. (*Id.*)

6. (3.) That matters of public history, affecting the whole people, are judicially taken notice of by the courts, that no evidence need be produced to establish them, but the courts act upon them

from knowledge obtained from such sources as they rely upon. (*Id.*)

7. (4.) That the existence of civil war in our country is a fact which the court is bound to know; that knowledge of the main fact would carry with it knowledge of the particular acts which created war. (*Id.*)

CONFESSIONS.

1. Where the confessions of a prisoner are wholly voluntary, it is no objection to their admissibility as evidence against him that they were made to a policeman, especially when the prisoner was not at the time in his custody, (*People agt. Wentz*, 37 N. Y. R. 303.)

2. Voluntary confessions are admissible in evidence against the party making them, and those are deemed voluntary which proceed from the spontaneous expressions of the mind, free from the influence of any extraneous disturbing cause. (*Id.*)

3. The confession may be admissible, though made in reply to a question assuming the guilt of the prisoner. (*Id.*)

CONSTABLE'S BOND.

1. Where an act is passed by the legislature, after the execution by a constable in the city of New York and his sureties of an official bond, which enlarges the jurisdiction of the district courts in said city and imposes new duties upon the constables, neither the sureties nor the bond are affected by such act. (*Mayer, Sec. of New York agt. Ryan*, ante, 406.)

CONSTITUTIONAL LAW.

1. The ninth section of "An act relating to the metropolitan board of health, and to the duties and powers of the commissioners of said board and the salaries of their subordinates, passed in 1867, provides as follows: "No preliminary injunction shall be granted against the metropolitan board of health, or of police, or its or their officers, or against the commissioners of said board in their capacity as a board of excise, or against the last named board, except by the supreme court, at a special or general term thereof, after service of at least eight days' notice of a motion for such injunction, together with copies of the papers on which the motion for such injunction is to be made." (*Burnside agt. Allen*, ante, 48.)

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2. *Held*, that this is a *public*, and not a private or local law, and, therefore, not exposed to the constitutional objection of containing other subjects than those expressed in its title. (*Id.*)
3. The act creating the metropolitan sanitary district is, essentially, a *penal* law, and therefore is a *public* act. (*Id.*)
4. This act of 1867, being constitutionally valid, it deprives this court of jurisdiction to hear any motion for an injunction against the boards and officers named in it. (*Id.*)
5. The first seven sections of the act of 1865, chapter 29, providing for state bounties to volunteers in the army and navy, &c., the 3d and 4th sections of which provide for and prohibit a sum not exceeding \$600 to be paid for each three years volunteer, became a law and took effect immediately on its passage. Feb. 10th, 1865, as declared in the act, and continued in force, notwithstanding the provisions of chapter 41 (*Laws of 1865*), passed on the 24th February, 1865, which re-enacted the same seven sections contained in chapter 29, and declared, "*this act is hereby declared to be a law from the time of its passage; but it shall not take effect until after the canvass of the votes by the board of state canvassers next after the general (next November) election.*" (INGRAHAM, J., dissenting.) (*Powers* agt. *Shepard*, ante, 53.)
6. Consequently, an agreement made on the 21st of March, 1865, to pay \$830 for each of such volunteers for three years, is void, as being in violation of chapter 29. (*Id.*)
7. The fourth section of said chapter 29, prohibiting a larger sum than \$600 to be paid for the three years volunteers, is not unconstitutional. (*Overruling the decision S. C. at special term*, 30 *How.* 8.) (*Id.*)
8. Section 7 of article 1 of the constitution of the state of New York of 1846, does not apply to the case where a right of way arises by necessity. (*Wheeler* agt. *Gilsey*, ante, 139.)
9. The act of 1865, so far as it authorizes the commissioners of the Central Park, instead of the common council of the city of New York, to make an application to this court for the opening of a road or public drive above Fifty-ninth street, is not unconstitutional, whatever may be considered as to the validity of some other portions of that act. (*Matter of Commissioners of Central Park*, ante, 255.)
10. The statute authorizing a municipal corporation to grade and improve its streets, and assess expenses among owners of property benefited, is constitutional. (*Howell* agt. *City of Buffalo*, 37 *N. Y. R.* 267.)
11. Assessment made after improvement has been paid for by the city makes no difference. (*Id.*)
12. The act of 1866, chapter 74, creating the "metropolitan sanitary district of the state of New York," is constitutional. (*The Metropolitan Board of Health* agt. *Jacob Heister*, 37 *N. Y. R.* 661.)
13. The legislature have the power to establish new civil divisions of the state, embracing the whole or parts of different counties, and when so established, section two, article ten, of the state constitution, is not applicable to such divisions. (*The People* agt. *Draper* (15 *N. Y. R.* 532) affirmed and approved. (*Id.*)
14. Neither is the act referred to in violation of that provision of the constitution which declares that the "trial by jury, in all cases in which it has heretofore been used, shall remain inviolable forever;" nor of that article which provides that "no person shall be deprived of life, liberty or property, without due process of law." No property or person is injured by this act. (*Id.*)
15. A jury has not been the ordinary tribunal to determine upon questions affecting the public health, prior to the adoption of the constitution of 1846. (*The Metropolitan Board of Health* agt. *Heister*, 37 *N. Y. R.* 661.)
16. The power to be exercised by the board upon the subjects in question is administrative, rather than judicial, in its character. (*Id.*)
17. The act of the legislature incorporating the village of Edgewater, passed March 22, 1866, provided that there should be seven trustees, four of whom should be elected in May, 1868, and three of whom should be elected in May, 1869, who should hold their office for two years. The act also provided that four persons, named therein, should be trustees from the passage thereof, until the election of their successors, in May, 1868, and that three other persons, named therein, should be trustees from the passage of the act until the election of their successors, in May, 1869. *Held*, that the appointment of the trustees named in the act was in violation of article 10, section 2, of the state constitution. (*The People* ex rel. *Brown* agt. *Blake*, 49 *Barb.* 9.)

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18. The provisions of chapter 29 of the laws of 1865, prescribing a maximum sum to be paid for enlisting soldiers, and forbidding the payment of a higher sum by cities, counties, &c., are not unconstitutional. (*Powers* agt. *Shepard*, 49 *Barb.* 418.)

CONTEMPT.

1. An order from a justice of the supreme court, made at chambers, requiring defendant to appear at special term and show cause why an attachment should not be issued against him, and he be punished for an alleged contempt and misconduct, is well served upon defendant's attorney, when so directed to be served, and defendant is bound thereby. (*Pitt* agt. *Davison*, 37 *N. Y. R.* 235.)
2. In an order to show cause, personal service of the order, together with the affidavits upon which it is grounded, upon the defendant, is not necessary. (*Id.*)
3. There is a distinction between proceedings to punish for criminal contempts and proceedings as for contempts to enforce civil remedies; in the former cases, personal notification of the accusation is necessary. (*Id.*)
4. Proceedings as for a contempt to enforce a civil remedy is a proceeding taken in the action, in respect to which the order was made. (*Id.*)
5. When the proceeding is by order to show cause, no interrogatories need be filed, to enable the party to purge himself of the contempt alleged. (*Id.*)
6. To sustain an application for an attachment to punish a judgment debtor for disposing of moneys received by him after the service of an injunction order in supplementary proceedings, the creditor must show affirmatively that the money was already earned by or due to the debtor, when the order was served. (*Gerregani* agt. *Wheelwright*, 3 *Abb. N. S.* 264.)
7. A county judge cannot punish for contempt in refusing to obey a subpoena to appear and testify before him, which is issued from the supreme court and attested in the name of one of its justices. (*People ex rel. Brunett* agt. *Dutcher*, 3 *Abb. N. S.* 151.)
8. Nor can he punish for contempt in refusing to attend pursuant to subpoena issued in his name, whether signed by him or not. (*Id.*)

CONTRACT.

1. Where a contract for the purchase of a lot of land is conditioned that a conveyance is not to be given until the terms of the contract are performed, by the payment of the whole purchase money, \$500, in yearly payments, and at the expiration of the time for the payment of the whole there remains a balance due and unpaid of \$200, and the vendor thereupon declares the contract void, and proceeds in an action of ejectment and gets possession of the premises, the vendee and those under whom he claims, never having paid or tendered the amount due upon the contract, have no claim legally or equitably to the title of the premises. (*Goodwin* agt. *Nelva*, ante, 402.)
2. Where an offer is made by telegraph, acceptance is completed by dispatching a notice that it is accepted, by telegraph; and the parties are bound by the engagement from that time. *So held*, in a case where the parties had previously agreed on the telegraph as a medium of business communication. (*Trevor* agt. *Wood*, 3 *Abb. N. S.* 355.)
3. The fact that delivery of the message is delayed (without privity of the party sending the message), and that the party to whom it is sent during the delay telegraphs a revocation, is not enough to exonerate him from the obligation to perform the agreement. (*Id.*)
4. When a stockbroker purchases stock for a customer, on an understanding that the customer is to keep up a certain margin, and that while it is kept good the broker will hold the stock for him, the customer does not, in the absence of an agreement to that effect, acquire a right to notice before the stock can be sold for a failure on his part to keep good the margin. (*Markham* agt. *Jawdon*, 3 *Abb. N. S.* 286.)
5. The relation of pledgor and pledgee, and the implied right of a pledgor to notice of time and place of sale of the pledge, do not arise in such a case. (*Id.*)
6. When and to what extent telegrams between parties are to be treated as written contracts, depends upon the circumstances in which they are sent, and the intent and object for which they are transmitted and received. (*Beach* agt. *Rar. and Del. Bay R. R. Co.* 37 *N. Y. R.* 457.)
7. Where there has been a previous communication between the parties in respect to the subject of the con-

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tract, and the telegram is sent to fix some one of the details of the agreement between them, as the price, time of enjoyment, etc., such telegram is evidence only for the purpose for which it was sent, and does not constitute the contract. (*Id.*)

8. Where the original propositions or agreement between the parties were oral, they are to be proved by oral evidence, as modified or affected by the telegram. (*Id.*)

9. Where plaintiffs had hired out their barge to be used only as a receiving barge in the dock, and it was used by the defendants as a transporting barge, and was thereby sunk, *held*, that the defendants are liable in an action in the nature of trover for the value of the barge, independent of any question of negligence in their manner of using the same. (*Id.*)

10. Two principles reiterated as well settled: First, that in a contract between A and B, wherein B agrees to pay money to C, the latter may maintain an action against B to recover the money. Secondly, that where land is conveyed "subject to a mortgage," without express agreement to pay, no action involving personal liability can be maintained by the mortgagee against the buyer. (*Dingledein agt. Third Avenue R. R. Co. 37 N. Y. R. 575.*)

11. A transfer was made by a partnership to the defendants of their road, franchises, horses, harness, etc., "subject to the payment of all the money which the partnership was bound to pay on account of sewers, etc.," which transfer was accepted by the defendants in writing. *Held*, that the party having a claim on account of sewers, as specified, could maintain an action against the defendants, and was entitled to recover from them the amount due to him from the partnership. (*Id.*)

12. This case distinguished from that of *Belmont agt. Coman* (22 N. Y. R. 438). (*Id.*)

CONTRACT TO PAY IN GOLD COIN.

1. A bill of exchange, drawn and accepted, "payable in United States gold coin," must be paid in gold, or its equivalent, if paid in legal tender notes. (*Bank of Prince Edward's Island agt. Trumbull, ante, 8.*)

2. We have two standards of value recognized by law, the one gold and silver, the other paper; either is a legal tender

for a debt, and a contract which calls for payment in gold calls for payment in a currency recognized by law, and there is nothing in law or in reason which forbids the parties from making such agreement; and when it is manifest that it was the intention of the parties that payment should be made in coin instead of paper, it is the duty of the courts to carry into effect such intention. (*Id.*)

3. In an action to recover damages for the conversion of the plaintiff's property, which is gold coin, the measure of damages is properly reached by fixing the value of the coin in currency; and this is the highest market price of the coin converted, between the time of the taking and that of the trial. (*Taylor agt. Ketchum, ante, 289.*)

CONTRIBUTION.

1. The rights and obligations of sureties *inter se*, are the same, whether they are bound under one or several like obligations for the same principal and for the same debt or default; and where there are several distinct bonds with several and distinct penalties, contribution between them is in proportion to the penalties of their respective bonds. (*Armitage agt. Pulver, 37 N. Y. R. 494.*)

2. In the above instance, the plaintiff had executed his bond as surety, in the penal sum of \$2,000, and the defendants had executed their bond in the penal sum of \$18,000, each for the same principal and for the same debt, etc. *Held*, that they were liable in the ratio of one-tenth and nine-tenths, or in the ratio of the penalties of their respective bonds, and that contribution might be compelled accordingly. (*Id.*)

CORPORATION.

1. Where the answer, in an action brought against the Merchants' Union Express Co. to enforce a dissolution, alleged that the nominal plaintiff was not the real party in the suit, but that the suit was prosecuted wholly at the instigation and in the interest of rival companies, and this allegation was not denied in the affidavit read by the plaintiff on a motion for the appointment of a receiver; *held*, that the allegation must be taken as true for the purposes of the motion, and that, taking it to be true, it was fatal to the suit. An illusory suit in the name of a shareholder, but really prosecuted by and in the interest of a rival and competing company, cannot be maintained for the purpose

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- of dissolving or restraining an association or company of which the nominal plaintiff may be a member. (*Waterbury agt. Merchants' Union Express Co.* 3 Abb. N. S. 163.)
2. It seems, that our courts will not presume that the executive authority of a foreign government has power, without some legislative or judicial sanction or approval, to annul or dissolve a corporation. (*Lee agt. American Atlantic and Pacific Canal Co.* 3 Abb. N. S. 1.)
 3. The rules of the common law relative to the dissolution of corporations, and the distinction between the dissolution of a corporation and the suspension of its franchises, and between the original charter and the charter of revival, considered. (*Id.*)
 4. A decree by which an act of incorporation is annulled, and the corporation dissolved, "except for certain purposes," and which declares that the corporation shall only continue in existence for purposes specified, and that persons shall be appointed as receivers to take its assets and carry on its business, does not operate to extinguish the existence of the corporation, in any such sense that it cannot be revived by repeal of the decree, or by other governmental act recognizing the corporation as existent. (*Id.*)
 5. Where, by a decree such as above described, a corporation was dissolved, and a subsequent decree of government contained a complete recognition of the corporation as existing, and by a new name: *Held*, that the latter decree should be considered as reviving the corporation under its old charter, and subject, though under a new name, to its debts and liabilities incurred under the old name. (*Id.*)
 6. Even if the second decree should be called a new charter, it ought not to be regarded as creating a new corporation, but as reviving and confirming and somewhat modifying the old one, at least as to foreign creditors of the old one. (*Id.*)
 7. A person employed by a manufacturing corporation as its *civil engineer and traveling agent*, at a fixed salary, is a *servant* of the corporation, within the meaning of the 18th section of the act of 1848, which makes the stockholders of such corporations personally and individually liable for debts due to their laborers, *servants* and apprentices. (*Williamson agt. Wadsworth*, 49 Barb. 294.)
 8. A service of a summons on a director of a corporation is regular, and will give the court complete jurisdiction of the parties. (*Curtis agt. The Ason, Genesee, &c., R. R. Co.* 49 Barb. 148.)
 9. An overseer and bookkeeper is a "*servant*," within the meaning of the statute authorizing the formation of companies for mining, mechanical and chemical purposes. (2 R. S. 5th ed. p. 658, § 18.) (*Hovey agt. Ten Broeck*, 3 Robt. 316.)
 10. A stockholder in a mining company is liable for the wages of a "*servant*" of the company, which became due within one year previous to the recovery of judgment against the company therefor; and this, even though his engagement was for a longer term than one year. (*Id.*)
 11. The doctrine of the voidness of contracts of corporations by reason of their being *ultra vires* is not favorably received by courts. Where parties have contracted in good faith with a corporation, and have performed their part of the contract, and the corporation has received and accepted the benefits, it is not to be tolerated that they should be permitted to seek exemption from performance on their part on the ground that they had no power to contract. The only exceptions to this rule are those cases, either where corporations are prohibited from making certain contracts by some express provision of law, or are authorized to contract only in some prescribed form. (*Per MONELL, J.*) (*The Madison Avenue Baptist Church agt. The Baptist Church in Oliver Street*, 3 Robt. 570.)

COSTS.

1. Where the plaintiff brings an action in a justice's court, and complains that the defendant wrongfully broke and entered his *close*, and then and there, at the times named, committed certain trespasses and did certain acts, and the defendant justifies *all the acts complained of*, on the ground that the *locus in quo* was at the time a public highway, &c., the justice should dismiss the action upon the question of title. (*Heath agt. Barmour, ante*, 1.)
2. But if the plaintiff, on continuing the action in the supreme court, recovers a verdict for any sum, for trespasses committed *outside of the alleged highway*, he is entitled to *costs*, although the defendant succeeds in justifying all his acts committed upon said highway. (*This agrees with Hall agt. Hodskins*, 30 How. 15.) (*Id.*)

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3. In an action prosecuted by a receiver for the collection of an alleged money demand, instituted or carried on for the enhancement of the fund, for the benefit of those to whom it is ultimately to be paid, the defendant, on obtaining judgment in his favor, is entitled to costs to be paid to him immediately out of the funds in the receiver's hands. (*Columbian Ins. Co. agt. Stevens, ante, 101.*)
4. The defendant in such case is not obliged to stand as a general creditor to await the final administration, and receive only (as the case may be) his distributive share of the fund *pro rata* with those for whose benefit he has been subjected to a groundless litigation. (*Id.*)
5. The scheme and principle proposed by the chapter of the Code in relation to costs, is, that where costs are allowed, they shall be paid by the fund or party who would be benefited by a counter judgment. (*Id.*)
6. Such a question is not one addressed to the discretion of the court in such a sense that no appeal lies to this court from the decision made in the court below. (*Id.*)
7. Where a justice of the peace, under the provisions of section 371 of the Code, and after a written acceptance of an offer, upon appeal, to allow judgment for a certain sum, "makes a minute thereof in his docket, and corrects such judgment accordingly," but refuses to allow disbursements and costs in the court below to the appellant, the appellant may apply to the county court by motion and have such costs taxed, and judgment entered in his favor for the amount in the county court; and an appeal can be taken therefrom to the supreme court. (*Ponto agt. Phelps, ante, 364.*)
8. Where the plaintiffs sued to recover of the defendants \$500 for the lighterage and storage of grain, and the defendants interposed a counter-claim for more than that amount for wastage and conversion of the grain, and claimed a balance in their favor, and the referee, on adjusting the claims on each side, found in favor of the plaintiff a balance of five cents, held, that the plaintiffs were entitled to costs. (*Griffen agt. Brown, ante, 372.*)
9. In cases in which more than two days are necessarily occupied in completing the trial, before the court, referee or jury, including the preparation and submission of written points or arguments, if that way of submission is agreed upon, the party succeeding is entitled to the additional \$10 costs, under subdivision 4 of section 307 of the Code. (*Mygatt agt. Wilcox, ante, 410.*)
10. In causes of an equitable nature—*e. g.*, an injunction suit—it is discretionary with the court in which the action is brought to grant or refuse costs. The amendments to the Code of Procedure passed in 1862, did not affect this rule. (*Staiger agt. Schultz, 3 Abb. N. S. 377.*)
11. An order of such court, directing that the plaintiff may discontinue the action without costs, is not reviewable in the court of appeals. (*Id.*)
12. Motions for extra allowances, under section 309 of the Code of Procedure, must be made upon papers. (*Gori agt. Smith, 3 Abb. N. S. 51.*)
13. Such a motion is addressed to the court, and is not dependent upon the recollection or discretion of the particular judge, as an individual. (*Id.*)
14. Since the decision of the court of appeals, December, 1855, in *People agt. New York Central Railroad* (39 How. Pr. 148), that orders for extra allowances under section 309 are appealable, it is necessary that the facts upon which motions for such allowances are made should be presented in such a mode as to have them passed upon on appeal. (*Id.*)
15. An extra allowance of costs may now be granted on an appeal from a surrogate's court, under section 309 of the Code of Procedure. Such an appeal is, for all purposes of costs, an action at issue on a question of law, and its determination constitutes a trial within the meaning of the section. (*Seguine agt. Seguine, 3 Abb. N. S. 442.*)
16. Upon an appeal from a judgment of a county court to the supreme court, the successful party is entitled to the full costs given by subdivision 5 of section 307 of the Code of Procedure. (*Gray agt. Hannah, 3 Abb. N. S. 183.*)
17. The right to those costs being given by statute, any provision in the order of the supreme court determining the appeal, which purports to limit the costs to a less sum—*e. g.*, a provision awarding motion costs only—is a nullity. (*Id.*)
18. Entering an order containing such a provision is not a waiver of the statutory costs. (*Id.*)
19. When a receiver of an insurance company prosecutes an action for the recovery of money for the enhancement

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- of the fund of which he is receiver, and fails to recover, the defendant is entitled to costs. (*Columbian Ins. Co. agt. Stevens*, 37 N. Y. R. 536.)
20. Such defendant is not bound to await the administration of the fund, and, as a general creditor, to share with other parties interested therein *pro rata*, but is entitled to an immediate order for the payment of the costs out of any funds in the hands of the receiver. (*Id.*)
21. When such receiver continues the prosecution of an action begun by the company before his appointment, he is chargeable with the costs, in like manner as if he were made a party plaintiff. (*Id.*)
22. A judgment recovered by a plaintiff for the interest merely of a bond conditioned to secure a certain sum of money, which provided that the principal should become due, in case the obligor failed to pay the interest on the days fixed therein, where the obligee failed to elect in his complaint to make the whole amount due, is so much more favorable to the plaintiff than a judgment for the principal, interest and costs, offered by the defendant, under the 285th section of the Code of Procedure, as to entitle the former to his costs in such action. (*Howard agt. Farley*, 3 Robt. 599.)
23. Only an averment in the complaint of an election by the plaintiff to consider the whole amount of principal due on such bond, will entitle the plaintiff, on such offer, to recover the principal, with interest. (*Id.*)
24. The costs of an action are to be taxed according to the fee bill existing at the time of the verdict or the dismissal of the complaint; and this, notwithstanding proceedings thereon are stayed. (*Scudder agt. Gori*, 3 Robt. 629.)
25. On a motion at special term for a new trial, upon a case, costs are to be granted as upon an appeal from a judgment. (*Id.*)
26. In an action in which double costs are given by statute, it is not necessary to award them in a judgment by the court of appeals, affirming a judgment of the court below, in order to entitle the successful party to them on appeal. The officer who adjusts the costs is bound to tax such costs as double, and the court below may either order him to do so, or, on appeal, correct his adjustment of them in that respect. (*Carpentier agt. Willet*, 3 Robt. 700.)
27. The death of a party entitled to double costs in an action, and the substitution of his representative as a party in his place, does not change the right to double costs. (*Id.*)
28. The representative of a party to an action, who dies while an appeal is pending in the court of appeals, is entitled to continuous term fees, after the death of such party, if the action and appeal are subsequently revived in his name. (*Id.*)
29. Costs of unsuccessful efforts to remove an injunction cannot be said to be damages arising from its existence, so as to be recoverable upon an undertaking given on granting the injunction. (*Childs agt. Lyons*, 3 Robt. 704.)
30. Costs and counsel fees, on a successful motion to dissolve an injunction, are considered the natural consequences of its existence, and are properly damages; but there is no reason why the party obtaining the injunction should pay the expenses of ill directed efforts to get rid of it. (*Id.*)

COUNTER-CLAIM.

1. Where the facts set up in an answer as a counter-claim are neither demurred nor replied to, they are to be taken as true, and the defendant will be entitled to relief thereon. (*Lawrence agt. The Bank of the Republic*, 3 Robt. 142.)
2. In an action by a tenant to annul a lease, upon the ground that fraud was practiced in procuring him to take it, the landlord may set up a counter-claim for rent which has accrued under the lease. (*Wood agt. Mayor, etc. of New York*, 3 Abb. N. S. 467.)

COUNTY COURT.

1. Where a justice of the peace, under the provisions of section 371 of the Code, and after a written acceptance of an offer, upon appeal, to allow judgment for a certain sum, "makes a minute thereof in his docket, and corrects such judgment accordingly," but refuses to allow disbursements and costs in the court below to the appellant, the appellant may apply to the county court by motion and have such costs taxed and judgment entered in his favor for the amount in the county court; and an appeal can be taken therefrom to the supreme court. (*Ponto agt. Phelps, ante*, 364.)

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COVENANT.

1. A covenant entered into between owners of adjoining city lots, for themselves and all claiming under them, to the effect that all buildings erected on such lots shall be set back a specified distance from the line of the street on which the lots front, is a covenant which equity will enforce between the parties to it, in favor of one against the other, or in favor of and against any subsequent grantee of either lot. (*Roberts* agt. *Levy*, 3 Abb. N. S. 311.)
2. A subsequent purchaser of a lot subject to such a covenant may be restrained from building in violation of the covenant. (*Id.*)
3. Such a covenant constitutes an "incumbrance" on the lot to which it applies; and if the covenantor subsequently conveys by a deed containing the usual covenant against incumbrances, a breach of the latter covenant arises the instant the deed is executed. (*Id.*)
4. The fact that a covenant constituting an incumbrance was upon record, whereby one who bought the land under a subsequent deed containing a covenant against incumbrances had constructive notice of it, does not affect his right to recover damages for the breach of the latter covenant. (*Id.*)
5. But if such purchaser had actual notice of the incumbrance at the time when he accepted the deed, it seems, that this fact may be proved in mitigation of damages. (*Id.*)

CREDITOR'S ACTION.

1. In a creditor's action brought against husband and wife to enforce a judgment against the husband out of real property held in the wife's name, it appeared that the real property was bought from the plaintiff himself, with money which the husband gave to the wife in good faith, at a time when he was free from debt, and also that the debt on which the judgment was recovered was incurred by the husband to the plaintiff, and the conveyance made by the plaintiff to the wife simultaneously and with a full knowledge of the facts attending the conveyance which he now sought to impeach:
2. *Held*, that the action could not be maintained. 1. A gift by a husband to a wife, made when he is free from debt, cannot be impeached on the ground of debts subsequently contracted. 2. The plaintiff was prevented

from impeaching the conveyance by having himself consented to it. (*Phillips* agt. *Wooster*, 3 Abb. N. S. 475.)

3. When a creditor authorizes his debtor to draw on him for the purpose of getting the draft discounted, and avails himself of the proceeds thereof, he is liable therefor, whether he accept the draft or not. (*Barney* agt. *Worthington*, 37 N. Y. R. 112.)

CRIMINAL CONVERSATION.

1. The law is now clearly settled to be that if it appears, in an action for criminal conversation, that the husband consented to his wife's adultery, it goes in bar of the action. (*Bunnell* agt. *Greathead*, 49 Barb. 106.)
2. If he was guilty of negligence, or of loose or improper conduct not amounting to a consent, it goes in reduction of damages. (*Id.*)
3. If the husband had it in his power and neglected to interpose, to prevent the debauchment of his wife, he can recover only the actual pecuniary damages which he sustained. (*J. F. BARNARD, J., dissented.*) (*Id.*)

CRIMINAL LAW.

1. It is never necessary to state, in a criminal warrant, the evidence by which the charge is to be supported. All that is required, in that particular, is to "recite the accusation." (*Pratt* agt. *Bogardus*, 49 Barb. 89.)
2. This requirement is satisfied by a statement which indicates with reasonable certainty the crime sought to be charged. (*Id.*)
3. Where a warrant, issued by a justice of the peace, after stating time and place, alleged that the defendant "designedly by false pretenses, did obtain from" the complainant "one sulkly of the value of \$30, the property of * * * with intent to cheat and defraud" the complainant: *Held*, that this was a valid warrant upon a complaint for obtaining property by false pretenses, although the pretenses used were not set out therein. (*Id.*)
4. Where, in issuing a criminal warrant, a justice of the peace possesses, and is exercising a general jurisdiction of the subject matter, and not a special jurisdiction over a particular offense, created by statute, and thereby restricted as to the manner of proceeding, all that is required, to protect him in so doing, is

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that the evidence produced is colorable—something upon which the judicial mind is called upon to act, in determining the question of probable cause. (*Id.*)

5. Where the affidavit, upon which application for a warrant was made, stated, in substance, that the defendant did designedly and by false pretense, obtain from the complainant one sulky, of the value of \$30, by falsely stating and representing to him that his own sulky was hard to ride in, and that he desired the complainant's sulky to go to Albany and would return it the next week, but that on the contrary he shipped it from Albany to Fort Plain, with intent to cheat and defraud the complainant: *Held*, that this was colorable evidence sufficient to call upon the justice to exercise his judgment in determining the propriety of issuing process; and that having acted in good faith, he should be protected. (*Id.*)

6. A general verdict, in a criminal case, is equivalent to a special verdict finding all the facts which are well pleaded in the indictment. (*Fitzgerald* agt. *The People*, 49 Barb. 122.)

7. Where, upon an indictment charging the prisoner with having committed the crime of murder in the first degree, the jury find a general verdict of guilty, the court is justified in pronouncing a judgment sentencing him to be hung. (*Id.*)

8. A common law indictment for murder is good and sufficient, in form, to charge the statutory definition of the crime; i. e. the premeditated design to effect the death of the person killed which the statute makes an indispensable ingredient of the crime, is comprehended in the averment of a willful and felonious killing with malice aforethought. (*Id.*)

9. On the trial of an indictment for murder, it appeared that the meeting of the accused and the deceased was casual, they having had no previous acquaintance; that the accused, taking offense at some trifling remarks made by the deceased, in passing him in the street, near mid-night, stabbed the deceased with a knife, which resulted in immediate death: *Held*, that the killing, though groundless, and probably without intent to take life, was "by an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any design to effect the death of any particular individual;" and that the evidence would have justified a verdict of murder in the first degree; but if that crime

was not established, it was clearly manslaughter in the third or fourth degree. That if not one of these offenses, there was no crime committed, within the definitions of the statutes. (*The People* agt. *Skeehan*, 49 Barb. 217.)

10. *Held*, also, that the offense was not within the definition of murder in the second degree, and the jury ought not to have been instructed that there was evidence upon which they could be permitted to find such a verdict. (*Id.*)

CUSTOM.

1. Custom may be incorporated into a contract, and become a part of it, where it appears, on its face or by its nature, to have been the intention of the parties that it should be, and when it can fairly be inferred therefrom, that the parties contracted with reference to it. (*Spear* agt. *Hart*, 3 *Robertson*, 420.)

2. So custom may control or vary the meaning of words, and when long established, may add to the terms of a contract. But under a contract to sell 100 shares of stock, a custom that something more passes to the purchaser, cannot be allowed. It would be an addition to the agreement, and not merely an explanation or interpretation of it. (*Id.*)

DAMAGES.

1. In an action to recover damages for conversion of property, it is competent to show on cross-examination of plaintiff the price actually paid, etc. (*Wells* agt. *Kelsey*, 37 *N. Y. R.*, 143.)

2. Where the plaintiff had, in a former action, recovered damages of the defendant for injuries to his land caused by flooding the same, the same causes continuing, and the same damages accruing to plaintiff as a result; in a subsequent action to recover for subsequent damages, the defendant will be estopped from denying damages as a result from the continuing cause of such damage. (*Plate* agt. *N. Y. C. R. R. Co.*, 37 *N. Y. R.* 472.)

3. As a matter of law, a former recovery for injuries sustained by the plaintiff, from the same cause, established the right of the plaintiff to recover damages subsequently sustained from same cause. (*Id.*)

DEATH BY WRONGFUL ACT.

1. An action for damages, under the

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statutes of 1847 and 1849, by the personal representative of a deceased person whose death was caused by the wrongful act or default of the defendant, is sustainable, if at all, on the same principle as if the deceased had survived the injury and was himself the plaintiff upon the record. (*Warner agt. The Erie Railway Co.*, 49 Barb. 558.)

2. It is not negligence, in law, for a passenger to follow the direction given by a servant of a railroad company, and to pass from one car to another, while the same are in motion, for the purpose of finding a seat. Whether in such case it was negligence, is a question for the jury. (*McIntyre agt. N. Y. C. R. R. Co.*, 37 N. Y. R. 287.)
3. As to pecuniary injuries sustained by the next of kin in case of death by negligence, the statute has set no bounds to the sources thereof; and they may be such as arise from the loss of personal care, intellectual culture or moral training, which would have been received had the deceased lived. (*Id.*)
4. The question, "what did the deceased usually earn?" is proper, as being an inquiry of importance in forming an estimate of the pecuniary loss sustained by the next of kin. (*Id.*)

DEBTOR AND CREDITOR.

1. The proper charges and expenses of converting a security into money, are first to be deducted from the gross proceeds; and it is the balance, only, which is applicable to the discharge of the debts. (*Sheldon agt. Raveret*, 49 Barb. 203.)
2. This is especially so, when the creditor is also the factor of the goods; he having a lien for all those charges, which cannot be divested without his consent. The factor is accountable only for the balance, after deducting his charges and expenses. (*Id.*)
3. A failing debtor has no right to interpose a legal title between his property and his debts, to compel his creditors to take notes, drawn on time, in payment of those debts. (*Downing agt. Kelley*, 49 Barb. 547.)
4. Where a debtor sold his stock of goods to his son and a clerk, taking their notes, without security, for the consideration, payable respectively at different times, from three months to three years from date, with the view of placing his property in a situation that his creditors could not take it under legal process; and to compel such creditors

to take those notes in payment of his debts: *Held*, that this was a legal hindering and delaying of creditors, which rendered the transfer in judgment of law void. (*Id.*)

DEED.

1. Where a grantor, in executing a deed of land, excepts and reserves "all the pine and hemlock timber suitable for sawing, and all necessary facilities for removing the same, with the right of flowing the lands now covered by the mill pond, while necessary for manufacturing the timber on the adjacent lands," he cannot be deprived of his property or reserved rights by an allegation that a *reasonable time* for removal and manufacture *has already elapsed*, and therefore his rights are extinguished. (*Gregg agt. Birdsall, ante*, 345.)
2. If any time could be fixed by the act of the adverse party—the owner of the premises, or by a judicial tribunal within which the power of removal and manufacture was to be exercised (which is doubtful, as the exception is absolute and unlimited), it should be in the *future*, by a *notice* given to the grantor to exercise his power of removal within some time to be named, so as to enable him to obtain the benefit of his reservation. (*Id.*)
3. Where a *contract* for the purchase of a lot of land is conditioned that a conveyance is not to be given until the terms of the contract are performed, by the payment of the whole purchase money, \$500, in yearly payments, and at the expiration of the time for the payment of the whole there remains a balance due and unpaid of \$200, and the vendor thereupon declares the contract void, and proceeds in an action of ejectment and gets possession of the premises, the vendee and those under whom *he* claims, never having paid or tendered the amount due upon the contract, have no claim legally or equitably to the title of the premises. (*Goodwin agt. Nelin, ante*, 402.)
4. The legal presumption is that a conveyance in fee carries with it whatever is, at the time, attached to the soil of the premises, and therefore that the grantee is the owner of the buildings on the land conveyed. This presumption, however, may be repelled by evidence. (*Meyer agt. Betz*, 3 Robt. 172.)
5. If a deed complies in all respects with a written agreement between the parties, the grantee cannot set up a mistake, in such a deed, in omitting to in-

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clude a strip of land therein, as a defense to an action to recover such strip, unless he alleges and shows that the written agreement was the result of a mistake, also. (*Christianson* agt. *Linford*, 3 *Robt.* 215.)

6. Upon an agreement to sell and convey a certain piece of land, "to be occupied for a Jewish synagogue," the grantees are not obliged to accept a deed which binds them, by a covenant running with the land, to occupy the premises for a synagogue exclusively, so as to render themselves liable in an action for damages, in case such covenant should be broken, but are entitled to a deed in which the provision touching such use of the premises is incorporated as a condition merely. (*The Congregation Shaaer Hashmon* agt. *Halliday*, 3 *Robt.* 386.)

7. The drawing of a deed containing a covenant, instead of a mere declaration or condition, by the grantees, and their request to the grantor to execute it, is not a waiver of their rights, nor will it estop them from demanding such a conveyance as was called for by the contract, upon his refusal to execute the deed tendered. (*Id.*)

8. M. and W. were the owners of adjoining farms, that of M. lying between the farm of W. and the public highway. M. conveyed to W. a strip of land twenty-four feet wide, and extending from the land of W. to the highway, by deed containing the following provisions: "The said party of the first part, for and in consideration of one dollar * * and for the faithful performance of certain things hereinafter mentioned to be done and performed by the party of the second part, his heirs and assigns, has granted, aliened, remised, released and confirmed, and by these presents doth grant, &c., unto the said party of the second part, and to his heirs and assigns, all that certain strip of land hereinafter mentioned, of the width of twenty-four feet, for a *private road*." * * * "The said party of the second part binds himself, his heirs and assigns, to and with the party of the first part, his heirs and assigns, that they may have free and full permit to travel the said road." The deed contained the usual covenant of warranty. *Held*, that the deed conveyed the strip of land in fee; the covenant on the part of the grantee, securing to the grantor the right to travel upon the said road, being consistent with the assumption that the grantee was to and did become the owner of the land, reserving to the grantor merely the right to

travel thereon. (*Kilmer* agt. *Wilson*, 49 *Barb.* 86.)

9. Where the grantor in a deed hands the same to another with instructions to deliver it, as his agent, presently to the grantee, the delivery not depending upon any condition, as between the parties to the deed, the title passes at the time of the delivery to the agent. (*Ernst* agt. *Reed*, 49 *Barb.* 367.)

10. Where the husband, on executing a deed of separation to his wife, by the same instruments gives personal property to one to hold in trust for the use of the wife, and the possession is thereupon transferred to the trustee, the gift is valid, although there be no consideration passing between the donor and trustee. (*Griffin* agt. *Banks*, 37 *N. Y. R.* 621.)

11. *It seems*, that a deed or agreement of separation, between husband and wife, will not be enforced, unless there is a consideration to support it. (*Id.*)

DEFENSES.

1. The giving of a new note by one of two joint and several makers, intended as a provision for the former note, not agreed to be taken in payment and not in fact paid, constitutes no defense to an action upon the original note. (*Bates* agt. *Rosekrans*, 37 *N. Y. R.* 409.)

2. The statement in the answer, as "a further defense," that the note in the complaint described arose out of partnership transactions, of which the defendant and one Bingham were members, and was given for the benefit of the partnership, and Bingham afterward transferred all his interest in the partnership property to the plaintiff, who was then the holder of the note, and, in consideration thereof, the plaintiff agreed with Bingham to pay his share of the debts of the partnership, and any balance due from him to the partnership, and to cancel the note: that Bingham's share of the debts amounted to more than the note; that Bingham owed the partnership a balance greater than the amount of the note; and the plaintiff has received and holds, under the assignment, property of more value than the amount of the note, and that he has not paid any part of the partnership debts, and refuses to apply the partnership property to the payment of the debts, is an answer, and not a technical counter-claim. (*Id.*)

3. A valid agreement between the holder and maker of a note, extending the

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maker's time for payment, and made without consent of the indorser, discharges him. (*Artisans' Bank* agt. *Backus*, 3 Abb. N. S. 273.)

4. But such agreement is matter of defense which must be affirmatively proved by the indorser. If, upon the evidence, it is left doubtful whether such an agreement was in fact made, the jury are warranted in rejecting the defense. (*Id.*)

DEPOSITIONS.

1. On an application for an order appointing a referee to take an *affidavit* or *deposition* of a person who refuses to make the same, to be used on a motion (*Code*, § 401, *sub. 7*), no *notice* is required to be given to the adverse party to the action of such application; and such party has not the right to appear before the referee to cross-examine the person making the deposition. (*Erie Railway Co.* agt. *Champlain*, *ante*, 73.)
2. Neither can the adverse party make a motion to set aside or vacate the order made on such application; the person whose deposition is desired is the only one who can make such a motion. (*Id.*)
3. Where a person whose *affidavit* or *deposition* is required to be used on a motion (*Code*, § 401, *sub. 7*) appears before the referee appointed for the purpose of taking such deposition, and is partially examined without objection, it is then too late for him to move to vacate the order appointing the referee, on the ground that he had not refused to make his deposition. (*Erie Railway Co.* agt. *Champlain*, *ante*, 74.)
4. History and objects of the statute authorizing the compulsory examination of a witness whose testimony is required for the purposes of a motion, stated. (*Brooks* agt. *Schultz*, 3 Abb. N. S. 124.)
5. Where the deposition of a witness is taken under an order pursuant to the statute, for his examination before a referee, the adverse party is entitled to notice of the examination, and may attend and cross-examine. (*Id.*)
6. It is not irregular for a referee to whom it is referred to take the testimony of a witness, to put questions in the course of the examination; no unfairness or intent to favor either party at the expense of the other being shown. (*Id.*)

DISCOVERY OF BOOKS AND PAPERS.

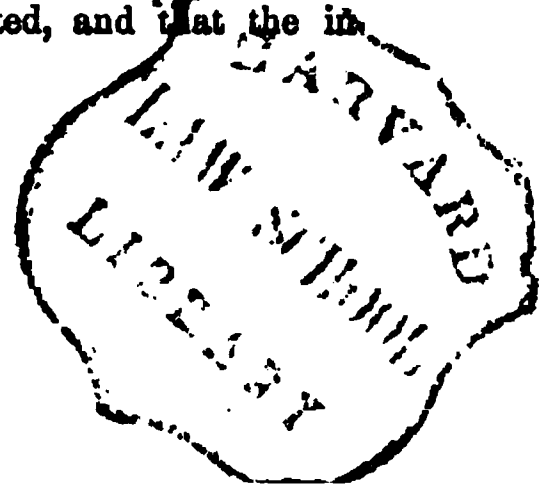
1. To obtain a discovery of books and papers, parties cannot substitute their own judgment, on vague information, the nature and source of which they do not disclose, for that of the court. Enough must be shown to enable the court to decide that the discovery is necessary. (*Kaupe* agt. *Isdell*, 3 Robt. 699.)
2. Where the necessity of an examination is alleged to be that such books will show that the defendants are partners; that they contain entries of moneys received and paid by one of the defendants, and a statement of his account; but the affidavits do not allege the character of a single entry which the court can determine to be material, a motion for a discovery will be denied. (*Id.*)

DISCRETION.

1. It is a settled principle of law that, where a discretion has been conferred by statute, its exercise cannot be reviewed, and is not subject to any appellate tribunal. (*Matter of the Extension of Church street*, 49 Barb. 455.)

DISMISSAL OF COMPLAINT.

1. Where a *complaint* in an action is *dismissed* before the issues have been tried or a verdict of the jury given, the judgment of dismissal is no bar to a subsequent action for the same cause. (*Wheeler* agt. *Ruckman*, *ante*, 350.)
2. And where a *complaint* is *dismissed* for want of proper parties, the judgment thereon not being on the merits, is no bar to a subsequent action for the same cause. (*Id.*)
3. In ordinary actions for damages for negligence, the question whether the plaintiff was free from negligence is a question of fact to be determined by the jury, under appropriate instructions, and subject to the revisory power of the courts. It is only where the proof of misconduct on the part of the plaintiff is clear and decisive that the court is authorized to grant a nonsuit. (*Ernst* agt. *Hudson River Railroad Co.* 3 Abb. N. S. 82.)
4. In an action against a railroad company for damages sustained by collision with a vehicle at a railroad crossing, it appeared that on the occasion of the accident the signals usually given by the company's agents of the approach of a train were omitted, and that the in-



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jured person approached and attempted to cross the track, without knowledge that a train was approaching. *Held*, that it was error to nonsuit the plaintiff. The question whether the omission of the signals was not negligence, and whether the plaintiff took reasonable precautions under the circumstances, ought to have been submitted to the jury. (*Id.*)

5. In determining the propriety of a nonsuit, the appellate court should assume the truth of the facts which the testimony offered on behalf of the plaintiff legitimately conduces to prove, notwithstanding their truth is controverted by the defendant's witnesses. (*Id.*)
6. In an action by an administrator to recover damages for causing the death of his intestate, if it appears from the plaintiff's evidence that the negligence or wrongful act of the deceased contributed to cause his death, the defendant is entitled to have the complaint dismissed. (*Per BOCKES, J.*) (*Curran agt. Warren Chemical and Manufacturing Co.* 3 *Abb. N. S.* 240.)
7. If no sufficient evidence to sustain a verdict in favor of the plaintiff is given, it is the duty of the court to take the case from the jury and to dismiss the complaint. (*Meyer agt. Betz*, 3 *Robt.* 172.)
8. Although an admission made by the plaintiff's counsel, in his opening, which is fatal to his case, may entitle the defendant to a judgment dismissing the complaint, yet a motion for dismissal will not be granted merely on the ground that the counsel has not stated, in his opening, sufficient facts to constitute a cause of action. (*Stewart agt. Hamilton*, 3 *Robt.* 672.)
9. A motion to set aside a complaint for non-conformity with the summons cannot be made before the summons has been served. (*Freemen agt. Young*, 3 *Robt.* 666.)

DISTRICT COURTS N. Y.

1. Where an act is passed by the legislature, after the execution by a constable in the city of New York and his sureties of an official bond, which enlarges the jurisdiction of the district courts in said city and imposes new duties upon the constables, neither the sureties nor the bond are affected by such act. (*Mayor, &c. of New York agt. Ryan*, *ante*, 408.)
2. Execution upon a judgment of a district court of the city of New York, which

has been docketed in the New York common pleas, may be issued by the attorney of the judgment creditor. It is not required to be issued by the clerk. (*Brush agt. Lee*, 3 *Abb. N. S.* 204.)

DIVORCE.

1. An action for *divorce* by a husband against his wife, on the ground that the wife and her former husband obtained a decree of divorce by *collusion and fraud*, in another state from that of their domicile, and against the laws of the latter state, and that the plaintiff married the defendant on the faith of the representations that she had procured a valid divorce from her former husband, cannot be maintained. (*Kinnier agt. Kinnier*, *ante*, 66.)
2. If the parties to the divorce suit colluded together, and by such collusion fraudulently obtained the decree of divorce, neither of them could possibly avoid that decree; it is binding upon both. (*Id.*)
3. Where both parties unite to practice a fraud, neither can be heard to seek relief against it; and as the plaintiff cannot be prejudiced if his marriage were lawful, he, a stranger, has no interest in the matter which would authorize him to impeach the judgment for fraud. (*Id.*)
4. This was an action for a limited divorce, which has been pending for some months. The plaintiff now moved, upon voluminous papers, for leave to file a supplemental complaint, alleging adultery, and praying an absolute divorce. (*Hoffman agt. Hoffman*, *ante*, 384.)
5. The court denied the motion, on the ground that the causes of action were incompatible, and that the complaint, if allowed, would be demurrable. (*Id.*)
6. In an action for a divorce, an order will not be granted referring the action to a referee "to try and determine the issues therein," though the attorneys for the respective parties sign a stipulation consenting to such order. (*Simmons agt. Simmons*, 3 *Robt.* 642.)
7. The court ought not, in any case, to neglect its obligation as the guardian of the rights of married women, so far as to delegate the power to hear and determine the issues, upon a careful consideration of the evidence, to others. (*Id.*)
8. To entitle the plaintiff to alimony and counsel fees, in an action for a divorce

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- for cruel and inhuman treatment, she must make it appear that she has been injured, and present a meritorious cause of action. (*Solomon* agt. *Solomon*, 3 *Robt.* 669.)
9. A single instance of cruelty is not sufficient cause to authorize the court to interfere, although vague charges of cruel treatment are also made against the husband. The parties to a marriage contract should bear long and patiently with each other; they should exercise the most forgiving spirit, and seek by all possible means to reconcile their differences, before resorting either to the protection or the power of the law to redress their wrongs. They should become fully satisfied that there is no longer any possibility that the duties of their married life can be discharged. (*Id.*)
 10. The court has full power to grant leave to the defendant, in an action for a divorce, to amend a former or file a supplemental answer alleging adultery on the part of the plaintiff, when discovered after the issues were joined. (*Strong* agt. *Strong*, 3 *Robt.* 669.)
 11. Although amendments may be refused in other cases, in consequence of laches, yet, in actions for divorce, the privilege of amending so as to set up a valid defense is not only allowable at any time before trial, but the court should encourage setting up any valid defense, the knowledge of which is brought judicially to it. (*Id.*)
 12. Upon a motion to amend, in such an action, the duty of the court is simply to ascertain whether the defendant has a reasonable prospect of establishing the recriminatory charge. If it thinks she has, this alone will give her the right to amend. (*Id.*)
 13. Good cause for granting alimony in an action for a limited divorce must be shown. It is not a matter of course. (*Bouhon* agt. *Bouhon*, 3 *Robt.* 715.)
 14. Mere allegations of abandonment, generally, and of a neglect or refusal to support, are not sufficient to warrant a grant of alimony, where they are denied. The applicant is bound to set forth the facts and circumstances which constitute the supposed abandonment, in order to enable the court to decide whether it ever occurred. (*Id.*)
 15. A wife who, without any assigned cause, quits the home provided for her by her husband, and goes to live elsewhere, without offering to return or to live with him, has no right to alimony. (*Id.*)
 16. Everything should be excluded from issues to be tried, in an action for a divorce, except what will affect the decision. Both parties are bound to point out the particular circumstances intended to be established, with reasonable precision as to time and place, as well as person. Therefore an issue, whether the plaintiff was guilty of adultery at any time, generally, before the commencement of the action, with a person mentioned in the defendant's answer, should not be included among those to be tried, where there is no reference in the allegation in the answer of the commission of such adultery to either time or locality by which to identify the offense charged. (*Strong* agt. *Strong*, 3 *Robt.* 719.)
 17. That is not one of "the facts contested by the pleadings" in the action, which the statute authorizes to be tried as an issue. (*Id.*)

DOGS.

1. Although it is unnecessary to prove that the owner of a dog had notice that his dog was vicious, to render him liable for the value of any sheep or lamb killed or wounded by such dog, the rule is different in respect to any other injury such dog may have done to the sheep or lambs of another. (*Osincup* agt. *Nichols*, 49 *Barb.* 145.)
2. To entitle the owner of sheep or lambs to recover of the owner of a dog for any damage done by such dog to such sheep or lambs, aside from killing or wounding them, it is necessary for the plaintiff to prove that the defendant had notice, or knowledge, of the vicious propensity of his dog. (*Id.*)
3. The owner of a dog is liable for the full value of each sheep or lamb wounded by his dog. To entitle the owner of the sheep or lambs to recover their value, it is not necessary for him to show that they died of their wounds. (*Id.*)

DRAFT.

1. Where the discount of a draft is at a rate of interest allowed by law, it is not rendered usurious by any legitimate use which may afterward be made of the paper, nor by an acknowledged purpose of the bank made at the time, of applying the paper to such future use. (*Farmers' and Mechanics Bank* agt. *Parker*, 37 *N. Y. R.* 148.)
2. The lender is entitled to retain the dis

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counted security in his own hands, or he may make any lawful disposition of it which will tend to his advantage. (*Id.*)

3. If a bank in Ohio, discounting paper, can, by submitting to a re-discount in this state, supply itself at once with current funds in New York, at an expense equivalent to the mere costs of collecting the draft at maturity, such re-discount secured a legitimate benefit to the lender, without prejudice to the borrower. (*Id.*)
4. The usury statute of Ohio is applicable only to banking corporations, and merely declares a forfeiture of the debt between the lender and borrower, without annulling the contract. (*Id.*)
5. In respect to purchasers of commercial paper, in good faith, under the laws of Ohio, it is no defense, that the transaction between the original parties was usurious. (*Id.*)

EASEMENT.

1. A person cannot have an easement over his own land. (*Wheeler* agt. *Gilsey*, ante, 139.)
2. Where a person owning a large plot of ground in the city of New York, makes a way over it from his dwelling to communicate with the open thoroughfares of the city, and uses such way over his own ground for a period of thirty years, and the plot is afterwards subdivided into and sold as city lots, a purchaser of a lot at such sale with the dwelling thereon, cannot claim by prescription a right of passage over the lots, part of such plot, purchased by others at such sale, on account of the original owner's use of the road in question. (*Id.*)
3. A purchaser at such sale of an inner lot, with the dwelling thereon, may claim a right of way by necessity over the lots which lie between him and the open streets of the city, and for such purpose may pass over the road used by the owner of the plot before the same was divided into city lots. (*Id.*)
4. The necessity out of which a right of way arises is strict, and should continue only as long as the necessity exists. (*Id.*)
5. Where an easement is annexed to a private estate, the due enjoyment will be protected by injunction. (*Id.*)
6. Section 7 of article 1 of the constitution of the state of New York of 1846, does not apply to the case where a right of way arises by necessity. (*Id.*)
7. Where a person is restrained by an order of injunction from performing an act on his own land, and stands by and suffers another to perform the act which he could prevent, he is guilty of a violation of the injunction. (*Id.*)
8. A. being the owner of a mill factory, together with the easement, or right, to carry the waters of a creek across a certain parcel of land thereto, the defendant, for the purpose of constructing its railroad, acquired by purchase, a portion of the land subject to such easement. The road being constructed in such a manner, and upon such a grade, that the water could no longer be conveyed to the factory across the land in a straight trunk, the defendant took down the original raceway, and carried the water under the railroad track, in a new trunk built for that purpose. A. accepted the new structure without objection, and used the water flowing through it, during his life: Held, that such acceptance of the substituted structure was in judgment of law a compensation for all damages sustained by A. in consequence of the removal of the original raceway. (*Arnold* agt. *The Hudson River Railroad Co.*, 49 Barb. 108.)
9. The legislature may rightfully authorize the construction of railroads, or other works of a public nature, without requiring compensation to be made to persons whose property has not actually been taken, or appropriated, for the use thereof, but who may, nevertheless, suffer indirect or consequential damages by the construction of such works. (*Id.*)
10. The case of a railroad company acquiring its roadway subject to an easement or servitude appurtenant to mill property, consisting of the right to carry water across the land of another, to the mill, is within the above principle. (*Id.*)
11. If the owners suffer an injury by having the easement impaired, this is an injury which the property suffers in consequence of the construction of a public work, under legal authority, and not of the taking of the property. (*Id.*)
12. Such a loss is to be regarded as *damnum absque injuria*, except in cases where, by statute, compensation is required to be made. (*Id.*)
13. A party wall, creating a community of interest between adjoining proprietors is in no just sense to be deemed a

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legal incumbrance upon the property. (*Hendricks* agt. *Stark*, 37 N. Y. R. 106.)

14. A party purchasing a hotel and premises at public auction, without being informed that part of the walls of the hotel adjoining other buildings are party walls, cannot, for that cause, refuse to complete the purchase. (*Id.*)

15. As between adjoining proprietors maintaining party walls, their mutual easement in walls is a benefit and not a burden to each of them. It is a valuable appurtenant, which passes with the title of the property. (*Id.*)

EJECTMENT.

1. A plaintiff, in ejectment, cannot establish his title to the premises by the mere recitals in a lease introduced in evidence of proceedings in the late court of chancery, by virtue of which the shares or interests of infants in the premises in question were ordered to be, and were, leased for a term of years. The proceedings themselves must be proved. (*Platt* agt. *Picton*, 3 Robt. 61.)

ELECTIONS.

1. A sale in foreclosure is not void because it was made on election day. (*King* agt. *Platt*, ante, 23.)

2. Where a summons in an action in a justice's court is returnable on the day of a general election, and there is no appearance, the justice acquires no jurisdiction, not even to adjourn the proceedings to another day. (*People ex rel. Monday* agt. *Schwartz*, 3 Abb. N. S. 395.)

3. A judgment entered on such adjourned day may be reversed on *certiorari*. (*Id.*)

EMBEZZLEMENT.

1. Where money has been embezzled, an action for damages to recover the amount embezzled may be maintained, without proving the specific property taken and converted. (*Gordon* agt. *Hosletter*, 37 N. Y. R. 99.)

3. When the amount of and title to the money are established by the admission of the defendant, there is no occasion to enter into particulars by evidence showing what part was in coin and what in bills. The admission of the defendant supplies every fact essential to show the conversion and to fix the measure of damages. (*Id.*)

EQUITABLE RELIEF.

1. Where a contract or obligation is given for two or more separate and independent things having no connection with each other, and one of those objects is the security of a usurious debt, although the contract is void altogether, and no action at law or in equity could be maintained thereon, nevertheless, if the party comes into a court of equity to ask that such contract be surrendered, all the statutes of usury have done affecting the complainant's right to relief is to forbid that any payment on account of such usurious debt shall be made a condition of relief. (*Williams* agt. *Fitzhugh*, 37 N. Y. R. 444.)

2. When a mortgage has been given upon lands in Ohio, to secure the payment of several promissory notes, a part of which notes are usurious and a part of which are *bona fide*, although the mortgage is void, a court of equity will require the complainant to do equity by paying or tendering payment of the valid notes covered by the mortgage, before it will entertain a suit to cause the mortgage to be delivered up to be cancelled, as a cloud upon title, etc. (*Id.*)

3. Where the facts alleged in the complaint, and proved on the hearing, entitle the plaintiff to equitable relief, and no question has been raised touching the mode of trial, a referee to whom the trial may be referred is bound, in obedience to section 275 of the Code, to grant the plaintiff any relief, legal or equitable, to which his allegations and proof entitle him. (*Armitage* agt. *Pulver*, 37 N. Y. R. 494.)

ERROR.

1. It is error for a single judge to hold a court of oyer and terminer in a place other than that fixed by the judges of the supreme court. (*Northrup* agt. *People*, 37 N. Y. R. 203.)

2. Where an erroneous charge is made by the judge, the verdict for the plaintiff must be set aside, unless it is shown that the error did not and could not have affected the verdict. It is not for the defendant to show how he was injured by it. It is for the plaintiff to show that no injury could have arisen from the error. (*Greene* agt. *White*, 37 N. Y. R. 405.)

3. A contract was made for the sale of a vessel and her tackle for \$3,000. The price included the freight to be earned by the vessel on a trip in which she

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was then engaged, deducting expenses. The judge erroneously refused to charge that, if the value of the vessel and the net freight together did not exceed \$3,000, the plaintiff was not entitled to recover. (*Id.*)

4. The jury found for the plaintiff \$700. *Held*, that this was an error for which the judgment must be set aside, and that it could not be said that no injury could have arisen from the error. (*Id.*)

ESTOPPEL.

1. An estoppel in pais may be urged against the defense of usury. And this estoppel is as applicable to an indorser of an accommodation promissory note, who represents that the note is valid business paper, as to the maker of the note. (*Mason* agt. *Anthony*, ante, 477.)
2. The question of intestacy is established by the adjudication of a competent court having jurisdiction of the subject matter and of the parties adjudicating and settling the same. (*Clemens* agt. *Clemens*, 37 N. Y. R. 59.)
3. Under the act of 1831 (*ch.* 200, § 2) the court of chancery were authorized, on the publication of an order requiring non-resident defendants, whether minors or of full age, to appear and answer in a partition suit to make a decree or order for taking the bill as confessed against all non-resident defendants. (*Id.*)
4. The act of 1833 (*ch.* 227) did not repeal the provisions of this act of 1831. (*Id.*)
5. But if non-resident minor defendants, against whom such decree *pro confesso* was taken, continue to acquiesce in such adjudication for more than six years after the youngest of them comes of full age, they will be estopped from controverting such decree afterward. (*Id.*)
6. Under our statute, an actual partition sale under a judgment in partition is effectual to bar the future contingent interests of persons not in esse, although no notice is published to bring in unknown parties, and though such future owners may take as purchasers under a deed or will, and not as claimants under any of the parties to the action. (*Id.*)
7. A decree respecting the personal status of an individual is equally conclusive with a decision upon a right of property; hence, the appointment or removal of a guardian or administrator,

or an adjudication on a question of descent or pedigree, is binding in all proceedings in which the same matter is agitated. (*Id.*)

8. A mortgagor cannot, in such a case, avail himself of a technical irregularity, in which he acquiesced at the time, as against a subsequent vendee in good faith. (*Hogan* agt. *Hoyt*, 37 N. Y. R. 300.)
9. Where the plaintiff had, in a former action, recovered damages of the defendant for injuries to his land, caused by flooding the same, the same causes continuing, and the same damages accruing to plaintiff as a result; in a subsequent action to recover for subsequent damages, the defendant will be estopped from denying damages as a result from the continuing cause of such damage. (*Plate* agt. *New York Central Railroad Company*, 37 N. Y. R. 472.)
10. As a matter of law, a former recovery for injuries sustained by the plaintiff, from the same cause, established the right of the plaintiff to recover damages subsequently sustained from the same cause. (*Id.*)
11. Where, in an action to recover the possession of a strip of land, the answer set up as a defense merely that the defendant took possession of the strip with "the knowledge, privity and consent of the plaintiff," and not that the latter did any act to induce the defendant to take such possession or expend any money in improving the premises; *Held*, that, strictly, the answer set up neither an equitable estoppel, nor any facts to support it, but that the defense so pleaded was rather a license to occupy than an estoppel. (*Christianson* agt. *Linford*, 3 Robt. 215.)
12. Although evidence which would have been admissible to prove such license has been admitted, in such case, without objection, the plaintiff is not precluded from availing himself of the defendant's omission to set up an estoppel in his answer, as an objection to his availing himself of it as a defense. (*Id.*)
13. A person encroaching upon the land of another by the overlapping of a wall, cannot resist the claim of the latter, on the mere ground that the owner was silent during the progress of the encroaching structure. (*Id.*)
11. Standing by and suffering an adjoining owner to build a wall on one's own land is not sufficient to pass the title; and the owner is not estopped, by his silence, from setting up his title and

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recovering the possession. Such a mere acquiescence without remonstrance is not sufficient to create an estoppel. (*Id.*)

15. Nor can an estoppel be created by the acts or the silence of an owner, where a party encroaching upon his land knew of the owner's title by the latter having actually derived it from the trespasser. (*Id.*)

16. A party accepting a transfer of personal property, expressly subject to a mortgage thereon, held by another, is estopped from claiming a prior lien upon the property by virtue of a previous mortgage, not properly renewed. (*Jones agt. Howell*, 3 *Robt.* 438.)

17. Nor can he set up such prior lien as a defense to an action by the subsequent mortgagee, after having voluntarily become the bailee of the latter, by accepting possession of the property as belonging to and promising to return the same to him on demand. (*Id.*)

18. An equitable estoppel cannot be created out of a mere executory promise, which is in fact a mere contract, and may be specifically enforced, or damages recovered for its non-performance, but only out of a misrepresentation or concealment of an existing fact or right. (*Springsteen agt. Powers*, 3 *Robt.* 483.)

EVIDENCE.

1. Where the plaintiff, a real estate broker, had been employed by the defendant to sell or exchange for him certain real estate, a farm and four lots; the farm he would sell for \$5,000, or would exchange the whole for \$13,000; and agreed to pay plaintiff's commissions at the rate of two and a half per cent: After a purchaser had been introduced to defendant by the plaintiff, and some considerable delay at negotiations, at which the defendant became dissatisfied, and requested the plaintiff to find him another purchaser, but upon plaintiff's request negotiations were renewed, and an exchange finally made, but the defendant insisted that the purchaser should pay the plaintiff's commissions, which was agreed to by the plaintiff in a note to defendant, by the purchaser, as follows: "Mr. B. (the purchaser), has agreed to assume the payment of your commissions on the exchange of property between you. Therefore, whatever you do will be in consideration of that fact." "Mr. B.'s promise is satisfactory to me." (*McClave agt. Maynard*, ante, 313.)

2. *Held*, that evidence offered by the defendant at the time of the delivery of this note, under the question: "At the time you (the purchaser) received the letter from McClave (plaintiff), what was said between you?" should have been received, and it was error to exclude it, as the plaintiff claimed that the amount of commissions fixed with B., the purchaser, was \$100, provided the valuation was \$5,000, as he represented it to be; when in fact the amount of the exchange was \$13,000. (*Id.*)

3. Any thing said by the plaintiff relating to the subject in controversy, was admissible, when offered by the defendant. (*Id.*)

4. A copy of a case used on an appeal from a judgment upon a former trial in this action, alleged to be in plaintiff's handwriting, offered in evidence for the purpose of showing a different statement by the plaintiff from that made on the present trial, is not admissible. (*Wheeler agt. Ruckman*, ante, 350.)

5. The case itself is no evidence of what took place on the former trial; and that it was in the plaintiff's handwriting is of no consequence. (*Id.*)

6. Parol evidence is admissible to contradict or explain a receipt of payment given by a party for goods or property sold: Thus, "received payment by note, three months," and "received payment of M. K. & Co.'s note, four months." (*Buswell agt. Pioneer*, ante, 447.)

7. Such receipts constitute no agreement between the parties that the notes mentioned therein, shall be taken as absolute payment, and therefore, being merely receipts, may be explained by parol evidence, by showing that the notes were not paid, and were valueless. (*Id.*)

8. Where the only issue formed by the pleadings, is the fact of payment in the manner set up in the answer, the affirmative of such issue is upon the defendant. (*Id.*)

9. Where the principal question litigated upon the trial was, whether the plaintiff sold his horse to the defendant for \$500, or whether he was delivered to the defendant to be taken to New York by a third person and sold on plaintiff's account, and the testimony of the plaintiff and defendant was directly in conflict upon the question:

10. *Held*, that the plaintiff was properly permitted to show that, on the same day that he claimed to have sold the horse to the defendant, he went

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- to his (plaintiff's) store, and, in the absence of the defendant, made an entry in his book of accounts, charging the defendant with the horse, at \$500, and that he subsequently exhibited this entry to the defendant, who admitted its accuracy. (GROVER, J., *dissenting*.) (Tanner agt. Parshall, ante, 472.)
11. The rejection of evidence which, although in its nature competent to establish the fact proposed to be proved, is wholly irrelevant to the sole issue submitted to the jury, is not a ground of exception. (Murphy agt. Baker, 3 Robt. 1.)
 12. Even though the court would, if sitting in the place of the jury, have come to a different conclusion from that reached by them, that will not warrant an interference with the verdict, where there is no such preponderance of evidence as to induce the belief that the verdict originated in either passion, prejudice or a mistake. (*Id.*)
 13. The court can never exclude relevant testimony because it does not establish at once the issue to which it relates. The different links may be introduced in succession. (*Id.*)
 14. The party against whom such testimony is introduced is amply protected against any prejudice, by his right to call on the court to direct the jury to disregard it, for all purposes, where it is not *prima facie* evidence of any material issue. (*Id.*)
 15. If his counsel neglects to do so, the court has a right to presume he does not think the evidence of sufficient importance to require such a caution. And it is no sufficient ground of complaint that the court, in such a case, has not volunteered to warn the jury against being misled, nor a reason for granting a new trial on the ground of an oversight. (*Id.*)
 16. In an action to recover damages for refusing to deliver bonds alleged to have been bought by the defendant as the plaintiff's agent, the plaintiff, to prove the value of the bonds, may show that they were paid by the company issuing them in gold. He may also prove what gold was worth, in currency, at that time. (J. C. SMITH, J., *dissenting*.) (Simpkins agt. Low, 49 Barb. 382.)
 17. It is erroneous to limit the plaintiff's recovery, in such an action, to nominal damages, where there is proof that the bonds were worth par, in gold, as collateral security, and the evidence warrants the conclusion that they were worth more than par, in currency. (*Id.*)
 18. Such evidence should be submitted to the jury, and it should be left with them to assess the damages, free from restriction. The legal tender act, passed by congress, is not to be construed as excluding such evidence from the consideration of the jury. (*Id.*)
 19. It was not intended by that act to enable an agent, after having recovered for a claim gold coin, to relieve himself from liability by payment in currency. (Per INGRAHAM, J.) (*Id.*)
 20. Where there are no actual sales of an article, a witness may give his opinion of the value of such article. (Per INGRAHAM, J.) (*Id.*)
 21. In an action of trespass *quare clausum fregit*, brought in a justice's court, the plaintiff's title to the premises was derived from and acquired under a deed from D. and wife, in which the grantors reserved title in one-half acre of the land, used for a cemetery, with the right of way to and from it. On the trial, the defendant asserted the right, under the exception or reservation in such deed, to go to the cemetery, across the plaintiff's land, for the purpose of burying a relative. The defendant did not plead title, and the plaintiff gave no evidence of title, but simply proved his possession, and the defendant's entry upon his close, and the damages sustained. The defendant then gave certain deeds, including that to the plaintiff, in evidence, for the purpose, as stated by his counsel, of showing the extent, limitation and restrictions of the plaintiff's possession, and not with a view to show title. *Held*, that for this purpose the deeds were clearly unavailable. (Allen agt. Dey, 49 Barb. 641.)
 22. Where money has been embezzled, an action for damages to recover the amount embezzled may be maintained, without proving the specific property taken and converted. (Gordon agt. Heatletter, 37 N. Y. R. 99.)
 23. When the amount of and title to the money are established by the admission of the defendant, there is no occasion to enter into particulars by evidence showing what part was in coin and what in bills. The admission of the defendant supplies every fact essential to show the conversion and to fix the measure of damages. (*Id.*)
 24. Where, in an action to recover damages for the conversion of property, the plaintiff attempts to establish the value of the property converted by his own

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- mere opinion, it is competent to show, on cross-examination, the price actually paid for the property converted on two business sales made prior to the commencement of the action. (*Welles* agt. *Kelsey*, 37 N. Y. R. 143.)
25. For the purpose of proving that the plaintiff, in his testimony, has overestimated the value of the property, it is competent to show the value of other articles included in the same purchase, as a test of the estimated value of the property converted. (*Id.*)
26. The signing of a receipt by a third party, without examination, describing the packages shipped as in good order on their reshipment, furnishes no evidence of the condition of the goods at that time. (*Hunt* agt. *Mich. S. and N. Ind. R. R. Co.* 37 N. Y. R. 162.)
27. Upon the issue whether goods were sold to the defendants or to a third party, it is competent for the plaintiff to prove that immediately prior to the sale he had been directed not to trust such third party, because he was not responsible, and he may prove it by the party giving him the information. (*Bronner* agt. *Frauenthal*, 37 N. Y. R. 166.)
28. Where it is proved that the witness resides out of the state, and that inquiries had been made at the time of the trial at his usual place of stopping when in the state, and the result left a reasonable ground to infer his absence from the state, the deposition, *de bene esse*, is admissible. (*Id.*)
29. Where the answer to a question is not responsive, the question to be considered, on exception, is independent of the answer given. (*Id.*)
30. Where the confessions of a prisoner are wholly voluntary, it is no objection to their admissibility as evidence against him that they were made to a policeman, especially when the prisoner was not, at the time, in his custody. (*People* agt. *Wentz*, 37 N. Y. R. 303.)
31. Voluntary confessions are admissible in evidence against the party making them; and those are deemed voluntary which proceed from the spontaneous expressions of the mind, free from the influence of any extraneous disturbing cause. (*Id.*)
32. The confession may be admissible, though made in reply to a question assuming the guilt of the prisoner. (*Id.*)
33. There is no presumption of law that the owner of premises upon which a death by accident occurs is chargeable with fault or negligence in respect to the cause of death, or with liability therefor. To charge him with damages, circumstances under which the injury occurred must be proved, showing some wrongful act or omission on his part. (*Curran* agt. *Warren Chemical and Manufacturing Co.* 3 Abb. N. S. 240.)
34. Upon a trial for murder, conversations had in the presence and hearing of the prisoner, at the time of the homicide, and tending to explain the prisoner's state of mind, may be given in evidence as a part of the *res gestae*. (*McKee* agt. *People*, 3 Abb. N. S. 216.)
35. The rule for determining what is sufficient evidence of premeditation to convict for murder stated. (*Id.*)

EXCEPTIONS.

1. Where several distinct propositions are ruled by a judge, and a *single exception* taken to them, it follows that, if any one of the propositions can be maintained, the exception is not well taken. (*Coghlan* agt. *Dinsmore*, ante, 416.)
2. On an appeal from an order refusing a new trial, applied for upon a case, as well as upon exceptions, if it appears that an expression of opinion upon a question of fact by the judge, in his charge to the jury, probably misled them, to the appellant's injury, a new trial will be granted. (*Markham* agt. *Jaudon*, 3 Abb. N. S. 286.)
3. When, upon trial of a cause at circuit, and before a jury, the court, on motion of defendant, when the plaintiff rests, dismisses the complaint, and the plaintiff excepts, it is competent for the judge to order the exception to be heard in the first instance at general term. (*Lake* agt. *Artisans' Bank*, 3 Abb. N. S. 209.)
1. Where, on an appeal founded on such exception, it clearly appeared that the court had decided the question upon a wrong issue, and had omitted to notice a fact material to the plaintiff's case: *Held*, that the exception ought to be regarded as sufficient to warrant the appellate court in reviewing the decision. (*Id.*)
5. The failure of a referee to find any facts is not a ground of exception, unless he is requested to find them. (*Hartford and New Haven Railroad Co.* agt. *The New York and New Haven Railroad Co.* 3 Robt. 411.)
6. When, under section 265 of the Code, the judge trying the cause, at the trial, directs exceptions to be heard in the

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first instance at the general term, and the judgment to be in the meantime suspended, *judgment* can only be given there. The power of the judge who tried the cause, over the disposition of the exceptions and judgment is limited thereby to the time of the trial. After that he has no more power to make an order in the action, as to the hearing thereof than any other judge. (*Devoc* agt. *Hackley*, 3 *Robt.* 679.)

7. Such a direction cannot be made by *consent*, any more than on an adverse application. It was intended by such revision that the court should exercise its discretion on the trial only, when embraced by the exceptions, under its then sense of their importance, and not on a subsequent deliberate re-examination and reconsideration of them. (*Id.*)
8. No judge of the court has authority, at any other time than at its trial, by an order, to prevent a cause from being argued at special term, which is required by law to be first argued there, and to send it to the general term for a first hearing there. The general term, in such case, cannot render a judgment, either of affirmance or reversal; and it cannot render an original judgment, as no authority was given it to do so, on the trial. (*Id.*)

EXECUTION.

1. It is not necessary, to sustain an execution against the person, that the liability of the defendant to arrest should appear by the judgment. Arrest is a provisional remedy; and when the facts which authorize it are extrinsic to the cause of action, they may be shown by proof outside of the judgment record. (*Lovee* agt. *Carpenter*, 3 *Abb. N. S.* 309.)

EXECUTORS AND ADMINISTRATORS.

1. Courts of equity have jurisdiction to call upon executors and administrators to account. Such power was frequently exercised by the late court of chancery, although the surrogate had jurisdiction over such proceedings. (*Christy* agt. *Libby*, ante, 119.)
2. The court of common pleas of the city and county of New York has the same jurisdiction exercised by the late court of chancery in actions, when the defendant resides, or is personally served with a summons, within the city of New York. (*Id.*)
3. The Revised Statutes do not confer on the surrogate exclusive jurisdiction over

proceedings to compel executors, administrators, or *collectors* to account; an action for such accounting may be brought in the court of common pleas of the city and county of New York. (*Id.*)

4. The title is a part of the complaint, but the allegations in the body of the complaint should control the title. (*Id.*)
5. *Reference of Claims against Executors and Administrators.*—On the 11th of May, 1866, the surrogate of Herkimer county made an order or writing in this case as follows:
 6. "SURROGATE'S COURT, Herkimer Co. In the matter of the claim of *James H. Bucklin* agt. *The Estate of Edmund G. Chapin*. The claim of *James H. Bucklin* having been presented to the administratrix and rejected, and the parties agreeing to a reference: It is ordered by the surrogate, that *Hon. Amos H. Prescott*, *Martin W. Priest, Esq.*, and *William T. Wheeler, Esq.*, and they are hereby appointed, referees to hear and determine the claim of said *Bucklin*; and let this order be entered with the clerk of Herkimer county.
 - "Dated 11th May, 1866, at Herkimer.
 - "VOLNEY OWEN, Surrogate.
 - "We assent to the above order, and consent the same to be entered May 11th, 1866.
 - "HARDIN & BURROWS,
 - "Attorneys for plaintiff.
 - "H. LINK,
 - "Attorney for administratrix.
 - "Indorsed, Filed 11 May, 1866.
 - "Z. GREENE, Clerk."
7. Held, 1st. That this order and consent taken together are an agreement in writing to refer required by the statute. (*Bucklin* agt. *Chapin*, ante, 155.)
8. 2d. That they constituted an approval by the surrogate of the persons agreed on as referees. (*Id.*)
9. 3d. That they were filed, and the fact of filing is noted on the paper, which answers the requirement that the agreement and approval must be filed. (*Id.*)
10. 4th. That the requirement of the statute, that the rule referring the claim to the persons indicated must be entered by the clerk of the supreme court, can be complied with by an entry by the clerk *nunc pro tunc*, if it was not actually entered at the time of filing. (*Id.*)
11. Assuming, however, that the papers are not in conformity to the statute, the referees nevertheless acquired jurisdiction to hear, try and determine the matters in controversy between the parties,

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by the *voluntary appearance* of the parties, the supreme court having jurisdiction over such claims, which were submitted to the referees; and their report is legal and binding until set aside by the court in some proceeding properly instituted for that purpose. (*Id.*)

12. There is no more necessity for an agreement in writing and rule of reference in the class of cases under the statute, like the present, than there is in references under the Code (§ 270); and under the latter it is well settled that proceedings upon a reference is a waiver of all objections because of irregularities. (*Id.*)

13. The appearance before the referees, the trial of the claim presented and report thereon, are all that are necessary to justify the entry of a judgment. All the preliminary steps may be supplied *nunc pro tunc*. (*Id.*)

14. One who, in the capacity of administrator, commences an action for the benefit of the estate, does not become liable for costs by the fact that before judgment he is removed from the administration. (*Baxter agt. Davis*, 3 Abb. N. S. 249.)

15. Where executors bring an action to close up the estate, against surviving partners of the testator, and it is alleged that moneys were withdrawn from the firm by the testator during his lifetime, and defendants interpose a counterclaim for the moneys thus withdrawn without their consent, the defendants, upon its appearing that the executors may probably make a distribution of the assets in their hands before the determination of the suit, may have an injunction to restrain them from so doing. (*Mitchell agt. Stewart*, 3 Abb. N. S. 250.)

EXEMPTION ACT.

1. The provisions of the exemption act extend to property owned by the debtor as a member of a partnership firm. (*Stewart agt. Brown*, 37 N. Y. R. 350.)
2. The statute should receive a liberal construction, in harmony with its humane and remedial purpose. (*Id.*)

EXPRESS COMPANIES.

3. An *express company* that agrees to take a promissory note to collect, and if not paid on presentation at the proper place, to have it *protested*, but neglects to cause it to be protested, are liable for the amount of the note, where there

is no sufficient evidence of a waiver of notice of non-payment, and notice of protest by the indorsers, who are discharged, and it appears that the maker is insolvent. (*Coghlan agt. Dinsmore, ante*, 416.)

EXTENSION OF TIME

1. Obtaining an extension of the time to answer a complaint involves an admission that the complaint requires an answer, and is a waiver of an objection that the demand of relief contained in it does not conform to the notice in the summons. (*Garrison agt. Carr*, 3 Abb. N. S. 266.)

FALSE REPRESENTATIONS.

1. Though an individual is not obliged to answer inquiries in respect to the solvency of a third person, yet, having undertaken to do so, he is bound by every consideration of fairness and honesty, as well as by law, to speak truthfully, and is not at liberty to suppress a fact within his own knowledge, bearing materially upon the pecuniary responsibility of such third person. (*Viele agt. Goss*, 49 Barb. 96.)
2. Where the defendant, on being inquired of by the plaintiffs in regard to the solvency of another, omitted to state in his reply the fact that the latter was largely indebted to him at the time, and alluded to his indebtedness in such a manner as would naturally have the effect to quiet any apprehension on that subject, and produce the impression that it was quite inconsiderable; and within a few months the indebtedness of such third person to him ripened into a judgment which absorbed the entire property of the debtor; and it was shown that, had the extent of such debtor's liability to the defendant been stated, credit would have been refused to him by the plaintiffs: *Held*, that the defendant was liable to the plaintiffs for the value of goods sold to such third person, on the strength of the defendant's representations. (*Id.*)

FORECLOSURE SUIT.

1. Although a *public judicial sale* of valuable city lots is not void because it takes place on an *election day* of a city charter election, yet, where it appears that, in addition to the fact that the sale was made on a day most unfavorable to a large gathering, and after a written notice to the referee from the defendant, the person to be most affect-

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ed by it, that he would consider it "unjust and oppressive;" that the lots were sold in an order contrary to the defendant's directions and wishes, and apparently detrimental to his interests, and under circumstances which gave rise to apprehensions that free competition was interfered with, the sale will be set aside and a re-sale ordered. (*King* agt. *Platt*, ante, 23.)

FOREIGN CORPORATIONS.

1. A foreign corporation doing business in this state is to be regarded as non-resident; and it is to be assessed and taxed upon all moneys in any manner invested in this state, the same as if it was a resident corporation; and the securities deposited with the comptroller are personal property, liable to taxation. Such an insurance corporation cannot exempt itself from this taxation, on the ground that it is not doing business in this state, by alleging and proving that it is now confined to collecting premiums and paying losses on old policies; and that it issues no new policies. This must be considered, "doing business," within the meaning of the statute, although it may be contracted. (*Smyth* agt. *International Life Assurance Co.*, ante, 126.)
2. The remedy by the receiver of taxes, for the collection and payment of such taxes from such corporations, is the same as against individuals. (*Id.*)

FORMER ACTION.

1. A former action, in order to be a bar to a second, must have been to recover for the same identical cause of action, or for some part thereof, as the plaintiff seeks to recover in the second. (*McIntosh* agt. *Lown*, 49 Barb. 550.)
2. The rule upon this subject laid down in *Phillips* agt. *Berick* (16 Joha. 140), approved. (*Id.*)
3. A judgment of non-suit, in a former action for the same cause, is not a bar to a subsequent action for legal relief. (*Gerregani* agt. *Wheelright*, 3 Abb. N. S. 264.)
4. R. brought a suit against the present defendants and D. to set aside a sale in foreclosure, for fraud affecting the title under which the mortgage was given. While the action was pending, the present plaintiff bought the mortgage. R. afterwards recover judgment that the sale was void for fraud in the mortgage, &c.: Held, that the report of a referee, and the judgment in that action,

were admissible on behalf of the plaintiff in the present action—which was to recover damages for fraud in inducing the plaintiff to buy the mortgage;—and that they were conclusive on the defendants, as to the facts adjudged. (*Craig* agt. *Ward*, 3 Abb. N. S. 235.)

FRAUD.

1. It is a fraud in law for one who is an agent to purchase for another, to fill the order with property of which he is the owner, concealing the fact of his ownership; and the principal, on discovering the breach of confidence, is entitled to rescind. (*Conkey* agt. *Bond*, 3 Abb. N. S. 415.)
2. The facts that the agent acted without compensation, and without intent to defraud, and made no false representations, are immaterial. (*Id.*)
3. It appearing, on appeal, in an action to rescind such a sale, that the agent, without his principal's knowledge, sold as owner what he bought as agent, a judgment dismissing the complaint will be set aside, and judgment absolute for the plaintiff (the principal) ordered. (*Id.*)
4. Where it appears that just before making an assignment for the benefit of creditors the assignor bought goods largely, representing himself to be solvent, the assignment will be set aside in favor of a receiver appointed in supplementary proceedings. (*Kennedy* agt. *Thorp*, 3 Abb. N. S. 131.)
5. The purchase of goods, accompanied by such representations, indicates a scheme of fraud, of which the assignment will be deemed a part. (*Id.*)
6. The receiver is not estopped from proving the fraud by the fact that the judgment creditor who procured him to be appointed as in his own case waived the fraud by bringing an action for goods sold and delivered. (*Id.*)
7. Where a person makes a false statement, not knowing that it is false, but knowing facts sufficient to put him upon inquiry, he is liable for the consequences to the same extent as if he had actual knowledge. (*Craig* agt. *Ward*, 3 Abb. N. S. 235.)
8. A finding by the referee, that an assignor for the benefit of his creditors had no actual design to defraud his creditors by making the assignment, is equivalent to saying that the assignment was made in good faith and with-

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out an intent to defraud creditors. (*Casey* agt. *Jones*, 37 N. Y. R. 608.)

9. A provision in an assignment exonerating the assignee from liability to account for debts which he is unable to collect, does not vitiate the assignment. (*Id.*)
10. It is also proper that the assignment should authorize the assignee to appoint an attorney for matters connected with the trust, which he could not attend to personally. (*Id.*)

FRAUDULENT CONVEYANCES.

1. Where a conveyance of the grantor's patrimonial property to his wife was a mere gift; not called for by any special exigency; and made by one engaged in business and heavily indebted, who continued so in debt until he became insolvent; and the grantor having afterwards contracted a debt to the plaintiffs by means of a false and fraudulent representation that no such gift had been made, failed soon thereafter, transferring the very property obtained by such false and fraudulent representations to his wife's father, who was his agent and co-operator in making such gift: *Held*, that such a state of facts wholly unexplained and uncontradicted, led irresistibly to the inference of a fraudulent intent on the part of the grantor, in respect to such gift. (*Per McCUNN, J.*) (*Loeschig* agt. *Addison*, 3 *Robert*. 331.)

GRANT.

1. By the terms of a grant, the plaintiffs' testator had "the right of conveying such quantity of water in an aqueduct under ground as shall be reasonable to be used" by him, "from any reservoir or spring of water now or hereafter found," on the lot occupied by the defendants; "provided that the quantity of water so used should not exceed the equal half part of the whole volume of water supplied by such reservoir or spring": *Held*, that the grant plainly authorized the construction of one aqueduct only, for the conveyance of water through the defendants' premises. That it gave no right to construct several, by way of experiment, to ascertain where the cheapest, or most convenient or most reliable route could be found, or to dig up the soil for the purpose of discovering other springs. (*Fitzhugh* agt. *Raymond*, 49 *Barb.* 645.)
2. *Held*, also, that the grantee, after constructing an aqueduct through the de-

fendants' lands, from a reservoir thereon, and using the same for a number of years, had not the right, when the same got out of repair, and from that cause failed to furnish a reasonable quantity of water, to go upon the defendants' lands, and construct another aqueduct, upon another route, and from another spring, nearer to the grantee's premises than the first reservoir, though such new aqueduct could be more conveniently and cheaply constructed than the old one could be rebuilt, and more easily kept in repair. (*Id.*)

3. *Held*, further, that the grant was not void for uncertainty; because it could be made certain by locating and constructing the aqueduct. *Certum est quod certum reddi potest.* (*Id.*)

HABEAS CORPUS.

1. Under the acts of congress of 1862-64, the courts of the states should not exercise jurisdiction to discharge men enlisted in the army of the United States. (*O'Conner's Case*, 3 *Abb. N. S.* 137.)

HIGHWAYS.

1. Where land which had never been a highway was taken by a plank road company for the purposes of its road, the same being either donated to the company, or purchased and paid for by it, and the plank road company was subsequently dissolved, and its road abandoned, whereupon the commissioners of highways of the town claimed the land for a highway, and continued to use it as such: *Held*, that although the plank road company was a private corporation, all lands taken by it were for *public use*; and that the use to which the land in question was now devoted, to wit: a highway, being also a *public use*, was not such a *change* of the use as to justify the original owner of the fee in taking possession of such land in default of a new compensation to him. (*Heath* agt. *Barman*, 49 *Barb.* 496.)
2. The statute of 1854, authorizing a plank road company to abandon its road, or portions of it, and providing that thereupon, the road shall cease to be the road or property of the company, and revert and belong to the several towns through which it was constructed, should be construed as meaning plank roads constructed upon lands, though they had not previously belonged to the town, or been used for highways. Such lands are to pass to the towns as highways. (*Id.*)

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3. Though the *reversion* in the lands taken for a plank road was and still continues in the original owner of the fee, yet the land having been lawfully taken for public use, the *title*, by the act of the original taker, and by force of the statute, passed to the town, upon the abandonment of the road, the same public use, in substance, being preserved. (*Id.*)
4. Whether an application for the laying out of a public highway, is an application for the laying out of one highway or of two highways, is a question of fact, upon which this court is bound by the decision of the court below affirming the judgment. (*People agt. Commissioners of Highways of Milton, 37 N. Y. R. 360.*)
5. A petition for the laying out of a public highway, may lawfully include a portion of a highway already in existence, and the new highway may, for a portion of its distance, be laid out upon and be identical with an existing highway. It is a question of discretion and convenience to be determined by the commissioners or referees. (*Id.*)
6. A description of a portion of the new highway, by reference to an established highway, is a description by "metes and bounds," and is a compliance with the statute on that subject. (*Id.*)
5. They hold thus not as joint tenants, or as tenants in common, but as tenants by entireties; and the same words of conveyance which would make two other persons joint tenants, will make the husband and wife tenants of the entirety. (*Id.*)
6. When the estate thus held by them is voluntarily converted into money, the same belongs to the husband, exclusively, in virtue of his marital rights. And no rule of equity will give the wife the entire amount, as her separate property, to the exclusion of the rights of the husband and of his creditors. (*Id.*)
7. In a case where there never was any separate estate or right in the wife, neither the statutes nor the rules of equity, are sufficient to enable her to appropriate the entire property to herself, to the exclusion of the husband's creditors, although they became such during the joint ownership. (*Id.*)

INDICTMENT.

1. The commencement of an indictment is to be distinguished from the caption thereof; for the caption constitutes no part of an indictment. (*People agt. Bennett, 37 N. Y. R. 117.*)
2. The caption consists wholly of the history of the proceeding where an indictment is removed from an inferior to a superior court; containing the name of the court; where it was found; the names of the jurors by whom found; and the time and place of the finding; and was entered in the record by the clerk of the superior court, immediately preceding the indictment. (*Id.*)
3. The commencement of an indictment is as follows: "The jurors of the people of the state of—, in and for the body and county of—, upon their oaths present," etc., and it is unnecessary and improper to name the jurors in the body of the indictment. (*Id.*)
4. Property purchased for the support of the poor by the direction of the superintendent of the county, and kept for that purpose, if stolen, may be laid in the indictment either as the property of the county or of the superintendent. (*Id.*)
5. The office of superintendent of the poor, though invested with corporate powers, is, notwithstanding, a mere agency of the county, and the relation between the county and its superintendent is that of principal and agent. (*Id.*)

HUSBAND AND WIFE.

1. Where the husband, on executing a deed of separation to his wife, by the same instrument gives personal property to one to hold in trust for the use of the wife, and the possession is thereupon transferred to the trustee, the gift is valid, although there be no consideration passing between the donor and trustee. (*Griffin agt. Banks, 37 N. Y. R. 621.*)
2. It seems, that a deed or agreement of separation between husband and wife, will not be enforced unless there is a consideration to support it. (*Id.*)
3. Our recent statutes for the better protection of the separate property of married women have no relation to, or effect upon, real estate conveyed to husband and wife jointly. (*The Farmers' and Mechanics' National Bank of Rochester agt. Gregory, 49 Barb. 155.*)
4. In such a case the wife has no separate estate, but is seized, with her husband, of the entirety; neither having any separate or severable part or portion, but the two, as one in law, holding the entire estate. (*Id.*)

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INDORSER.

1. When one standing in the character of second indorser upon commercial paper is not made liable at the maturity and non-payment of the note, no act or indorsement of the payee, subsequent to the maturity of the note, can render the second indorser liable. (*Bacon* agt. *Burnham*, 37 N. Y. R. 614.)
2. Where upon the face of the note it appears that a party indorsing it stands in the relation of second indorser, it matters not whether the payee write his name above or below such indorser, he must be deemed to be first indorser, and one upon whose credit the second indorser wrote his name. (*Id.*)
3. Where a prior indorser cannot recover against a subsequent indorser, no person deriving title under such prior indorser, with knowledge of the facts, can do so. (*Id.*)

INFANTS.

1. An infant, when suing in his own behalf for injuries to his person arising from the negligence of others, must be free from the imputation of negligence on his part, tending to produce the damages sought to be recovered. The rule is the same, whether the action be by an infant or an adult. (*Burke* agt. *The Broadway and Seventh Avenue Railroad Company*, 49 Barb. 529.)
2. It is no excuse for the want of ordinary prudence by an infant, that he had less discretion than a man. He is required to exercise the prudence of a person of ordinary intelligence, before an action for damages can arise for an injury to his person, resulting from the carelessness of others. (*Id.*)
3. An infant is required to take the same care of himself as any other person. All are held accountable for a reasonable degree of prudence, as to their own safety. (*Id.*)
4. The father of an infant, suing for damages sustained by the latter through the negligence of others, can recover only under the same circumstances of prudence as would be required if the action were in behalf of the infant. (*Id.*)
5. After an answer has been put in for an infant, by his guardian *ad litem*, and judgment has been entered, the regularity of the guardian's appointment cannot be questioned. (*Bernard* agt. *Heydrick*, 49 Barb. 62.)

6. A deed executed by an infant is at least voidable, if not void. (*McIlvaine* agt. *Kadel*, 3 Robt. 129.)

INJUNCTION.

1. Where a person is restrained by an order of injunction from performing an act on *his own land*, and stands by and suffers another to perform the act, which he could prevent, he is guilty of a violation of the injunction. (*Wheeler* agt. *Gilsey*, ante, 139.)
2. Where the court, in an action to set off judgments, directs such set off upon condition that the plaintiff pay the costs of the supplementary proceedings instituted by the defendant on the judgment against the plaintiff, and deliver to the defendant a receipt, by the plaintiff applying the amount of the defendant's judgment on the judgments held against the defendant by the plaintiff, the defendant cannot refuse to accept such costs and receipt, on the ground that the plaintiff could not properly execute such condition, as he would be violating the injunction in the supplementary proceedings. (*Butler* agt. *Niles*, ante, 329.)
3. The acts required of the plaintiff are authorized by the judgment of the court, which is necessarily a complete justification and protection to him for all acts done under it. (*Id.*)
4. Besides, if the performance of such condition could be regarded as a violation of the injunction, it would merely subject the plaintiff to punishment as for a contempt, and would not render the receipt or the payment of costs ineffectual or invalid. Therefore the defendant would have no concern in the matter. (*Id.*)
5. The supreme court has no power to grant an *injunction order* in one action, staying proceedings in another action pending in the same court; nor in another court having full jurisdiction over the subject matter. (*Schell* agt. *Erie Railway Co.* ante, 438.)
6. An injunction will be granted to restrain the Croton Aqueduct Board of the city of New York from cutting off the Croton water from the plaintiff's building, on the ground of non payment of the water rate, where the rate charged by them, and for non-payment of which they claim to stop the supply, is more than is authorized by law. (*Cromwell* agt. *Stevens*, 3 Abb. N. S. 26.)
7. An injunction cannot be granted, upon

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the ground of nuisance, to restrain acts done in the lawful exercise of authority. (*Masterson* agt. *Short*, 3 *Abb. N. S.* 154.)

8. An injunction may be granted by a state court to restrain persons from prosecuting a claim before an American consul abroad, where the consul has not jurisdiction of the proceedings instituted before him. (*Dainese* agt. *Allen*, 3 *Abb. N. S.* 212.)
9. A warrant of dispossession in summary proceedings to recover the possession of land will be stayed by injunction, where it appears that the possessor summoned had not time to arrive at the court room before the hearing, after the service of the summons, (*Griffith* agt. *Brown*, 3 *Robt.* 627.)
10. An injunction is never granted where the material allegations are made upon information only; and it is refused, as a general rule, in all cases where such material allegations are denied by the party sought to be restrained. (*Pidgeon* agt. *Oatman*, 3 *Robt.* 706.)
11. An injunction to restrain a lessor from asserting any right to cancel a lease, under a reservation of a right to do so in case of a sale, or an election to build, will not be granted upon a mere general allegation that an alleged sale and conveyance by the lessor was sham and colorable, and made only with the design to deprive the lessee of the remaining term of the lease by a collusive and pretended sale of the premises; if the defendants deny every material allegation of the complaint, and assert that the conveyance was made in good faith; and the case can probably be tried and disposed of upon its merits before the time fixed by the lessor, in his notice, for cancelling the lease. (*Id.*)
12. An injunction dissolved on the grounds: 1. That the affidavit and papers on which it was granted were illegible. 2. That the injunction had not been served on the defendant personally. 3. That the papers had not been filed, as required by the rules of the court. (*Johnson* agt. *Casey*, 3 *Robt.* 710.)
13. While, as a general rule, the courts of this state decline to interfere by injunction to restrain its citizens from proceeding in an action which has been commenced in the court of a sister state, there are exceptions to this rule; and when a case is presented fairly constituting such exception, extreme delicacy should not deter the court from controlling the conduct of a party within its jurisdiction, to prevent oppression or fraud. No rule of comity or policy forbids it. (*Vail* agt. *Kaapp*, 49 *Barb.* 299.)
14. Thus, where property subject to chattel mortgages held by the plaintiffs was attached in the state of Vermont, in an action brought there, in the name of the defendants, against the mortgagors, residents of this state, which property they were about to sell; and it appeared that the property, at the time it was attached, was actually and necessarily used by the mortgagors (a railroad company), in conducting their business, and that the seizure thereof had seriously embarrassed them in transacting their business, thereby materially diminishing their ability to pay the mortgage debts; that the parties to the record in the action in Vermont were citizens of this state; that the plaintiffs were not parties to such action, and could not properly be heard therein; that the plaintiffs' mortgages, being unaccompanied by actual possession, were not, as against creditors, recognized as valid by the courts of Vermont, but were valid in New York; that the defendants had voluntarily consented to the use of their names as parties to the action pending in Vermont; and had received indemnity from another person; and that such action and proceedings were prompted by hostility to and a desire to injure the mortgagors, which, if successful, would impair, if not wholly destroy, the plaintiffs' securities: *Held*, that the case was *special*, within the decisions of the courts of New York; and as such, justified the continuance of an injunction restraining the defendants from selling the mortgaged property until the final termination of the action brought by them in Vermont. (*Id.*)
15. Where the gist of an action was the alleged use by the defendants of a secret process of enameling, which R., one of them, had covenanted with the plaintiff not to divulge, and the exclusive right to use which the plaintiffs claimed to have acquired from R. by purchase, it was *held*, that there was no ground for the exercise of the equitable jurisdiction of the court, unless it was established that the defendants, some or one of them, were using the same secret process to which the covenants related, or that they threatened or intended to make the secret known, contrary to the stipulations of R. (*Nesle* agt. *Reese*, 49 *Barb.* 374.)
16. Where there was no positive evidence that the process in question was used in the business carried on by the defendants, the only testimony on that

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point produced by the plaintiff being that of himself, detailing some circumstances observed by him in the defendants' shop, which tended in some degree to show that the process there used was the one in question, but came far short of establishing the fact; and the testimony of R. left it at least doubtful whether he used the process in question while in the employ of his co-defendant: *Held*, that the refusal of the judge to find that such process was used in the defendants' business was not error, and that the testimony was not so clear and satisfactory as to warrant the court in finding the fact, contrary to the implied finding of the judge. (*Id.*)

INNKEEPERS.

1. *Liability of Innkeeper.*—A guest, with his team of two horses and wagon, stopped at a village tavern, and after having had his horses put in the barn and fed, and having himself taken dinner, and paid his bill for the whole, requested the innkeeper to get his horses; the latter told him to go on and be hitching up, and he (the innkeeper) would be out in a few minutes; the guest went to the barn, put the head stalls on the horses, and was getting them out; and while doing so the innkeeper arrived there; but before the innkeeper arrived at the barn two men rode up in a buggy, unhitched their stallion horse and placed him in a stall between those occupied by the guest's horses and the outer door.
2. The guest led one of his horses out of the door for the purpose of hitching on to the wagon; and the other horse followed on, as he was accustomed to do, and when passing the stall where the stallion stood, received a kick from him which broke its leg and rendered it entirely worthless, so that it became necessary to kill it:
3. *Held*, that the innkeeper was liable. The relation of landlord and guest had not terminated; the horses were still on his premises and in his barn; the guest was only doing for the innkeeper, and with his assent, what it was his duty to have done. (*Seymour* agt. *Cook*, ante, 180.)
4. The statute of April, 1860 (*Sess. Laws* 1860, ch. 446, p. 771) only gives the keeper of a boarding house a lien upon and right to detain the baggage and effects of a boarder for the amount which may be due by him, to the same extent and in the same manner as innkeepers have them. (*Shafer* agt. *Guest*, ante, 184.)
5. Thus limiting the lien to that for board actually due, and not including board to become due under an agreement to board in future. (*Id.*)
6. Nor can the act be extended to any other indebtedness, nor to any demand not due at the time of the detention. (*Id.*)
7. The liability of an innkeeper for all property of his guests brought into his inn without his knowledge, and particularly without notice of their value or nature, cannot be unlimited. (*Per ROBERTSON, Ch. J.*) (*Wilkins* agt. *Earle*, 3 *Robt.* 352.)
8. It is such negligence, in a guest who brings to an inn other or more articles, or of more value, than are necessary for traveling purposes, not to give notice thereof to the innkeeper, that it relieves the latter from all liability for them in case of loss. (*Id.*)
9. In the rooms of the defendants' inn notices were posted, requiring "all packages of value" to "be properly labelled and deposited in an iron safe, kept in the office for that purpose." The plaintiff, a guest at such inn, had a sealed envelope, with his name in pencil thereon, which contained legal tender notes, bank bills, checks, &c., and other negotiable instruments, of the value of \$22,000, upon a counter in the office, and desired a clerk to put it in the safe. Upon such clerk asking what it was, the plaintiff answered "money," without stating the amount. No receipt or check was given; the clerk informing the plaintiff that they gave no checks, but required the guests to describe their packages before delivery. The clerk deposited the package in the safe, which he locked. It was stolen the same night from such safe. *Held*, 1. That the limitation, by the statute of 1855, "regulating the liability of hotel keepers," of the liability of innkeepers for valuables in their inns, upon their providing a place of safe keeping for such valuables, and giving the notice it requires, did not change, in any respect, any other relation or duty of the parties to each other, affecting such liability. 2. That the obligation of the guest to notify the innkeeper of the nature and extent of his charge remains the same after as before the passage of that statute. 3. That the defendants had a right, in the notice published by them, under the statute, to require valuables deposited in their safe to be "properly labelled," which included some such specification of the contents as would indicate their general nature and value. 4. That the package

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in this case, having no other mark upon it than the owner's name in pencil, was not "properly labelled," as required by the notice; and that the plaintiff, in limiting his reply to the clerk's question as to its contents to the word "money," without stating any amount or value, did not disclose enough to induce any extra precaution or charge, for taking care of it, and did not change the defendants into bailees, so as to make them responsible as such. 5. That the defendants were not liable to the plaintiffs for the entire amount deposited in their safe, but only for the amount of money necessary to defray the plaintiff's ordinary traveling expenses (found by the jury to be \$1,000), contained in such package. (McCUNN, *J. dissenting.*) (*Id.*)

INSANITY

1. In border cases it is difficult to distinguish between sanity and insanity. In most cases there is ample distinction. (*Haviland agt. Hayes, 37 N. Y. R. 25.*)
2. A course of action for a series of years different from that pursued by mankind at large and different from his own conduct and character; where the principle feelings and grounds of action differ from those we recognize as governing ourselves; where the better part of our nature is abandoned, civilization and refinement neglected; where this difference is permanent and marked: where there is a change from careful attention to business to an entire abandonment, and the control of no money or property; where the individual is shaved daily by his wife, and becomes the inmate of an asylum, dying confessedly insane,—these facts furnish evidence of long insanity. (*Id.*)
3. In the present case the evidence cited shows a case of insanity of the grantor at the time of the execution of a deed to his son, and of a subsequent confirmatory deed to the defendant. (*Id.*)
4. One may be certainly insane who is neither a raving maniac nor an absolute imbecile. He may be able to restrain his violence for a time, and to act with discretion and judgment. There may be remissions or mitigations of this disease, and yet the party be continuously insane. (*Id.*)

INSOLVENCY.

1. Insolvent debtors, in failing circumstances, may make preferential assign-

ments. (*Spaulding agt. Strong, 37 N. Y. R. 135.*)

2. They may stipulate to pay a certain *per cent* to creditors who will execute a release on receiving it, and may prefer such class. (*Id.*)
3. Remaining creditors, refusing to execute such release, must be content to take their pay out of the residue, after the preferred class are paid. (*Id.*)
4. The history of the legislation of the state on the subject of insolvents' discharges reviewed, and former decisions compared. (*American Flask and Cap Co. agt. Son, 3 Abb. N. S. 333.*)
5. A discharge in insolvency, granted under the laws of New York, is not rendered invalid by the fact that the petitioner omitted to give notice of the proceeding to the creditor who impeaches the discharge; nor by the fact that he omitted to name such creditor in his schedule of creditors, unless a fraudulent purpose in such omission is proved. (*Id.*)

INSPECTION OF BOOKS AND PAPERS.

1. No member of a *municipal corporation* has the right to a *general inspection* of all documents in the hands of any *corporate official*, at all times and from any motive, or with any object or interest irrespective of the fact whether he has any personal interest in such documents, or any information to be derived therefrom. (*People ex rel. Henry agt. Cornell. ante, 31.*)
2. Such general inspection can be had only where the member has a private or personal interest in such documents or the information to be derived therefrom. (*Id.*)
3. And this rule applies to a corporator who is also a member of a public association organized within the municipal corporation, and who makes application for such inspection on behalf of such association. (*Reversing this case, 32 How. 149.*) (*Id.*)

INSURANCE—LIFE.

1. A policy of life insurance for a year which contains a clause continuing it until the decease of the insured, *provided* he shall pay to the insurers annually, on a day named, a specified sum, and a condition that no insurance (whether original or by renewal) shall be considered as binding until the actu-

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al payment of such sum. ceases to be binding upon the insurers, in case of a failure to pay the premium so fixed for renewal on or before the day on which it is made payable by such policy. (*Howell agt. The Knickerbocker Life Insurance Company*, 3 Robt. 232.)

2. Parol evidence of a practice or agreement on the part of the insurers to receive payment of premiums after the day on which they became due (even if admissible), will not suffice to vary the written contract. (*Id.*)
3. Such a custom on the part of the insurers, or their verbal agreement to that effect, will not apply to premiums not offered to be paid until after the death of the insured. (*Id.*)
4. Where a premium, under such a policy, became payable on the 15th of July, but on the morning of that day, before it had been paid, the insured was struck with apoplexy or paralysis, and continued in a dying condition until the next day, when he died: *Held*, that the death occurred at a time not covered by the policy; that the insurance could not be continued under the policy beyond the day on which the annual premium was rendered thereby payable; and was neither revived nor renewed by a tender of the premium after the death of the insured, though made within a few days after the day of payment. (*Id.*)
5. A physician, not engaged in practice, who is present as a friend and neighbor when a wounded man is brought to his own house, and who, at the request of another neighbor, examines the wounds and administers an opiate, is not necessarily an "attending physician," within the conditions of a life insurance policy on that subject. At the most, it is a question for the jury. (*Gibson agt. Am. Mut. Life Ins. Co.* 37 N. Y. R. 580.)
6. In an action upon a life insurance policy, where the question in contention is whether the death of the deceased was accidental, or whether it was a case of intentional self destruction, it is not competent to show that the deceased was an infidel or an atheist, for the purpose of arguing that the deceased would therefore have been more likely to have committed suicide. (*Id.*)
7. Such evidence would be uncertain, remote, speculative, and based upon no well defined legal principle. (*Id.*)

INSURANCE—MARINE.

1. The implied warranty of the seaworthiness of a ship, by the insured, is limited to the beginning of the voyage. If she becomes unseaworthy afterwards, from any cause whatever, the underwriters are liable. (*Walsh agt. Washington Marine Insurance Co.* 3 Robt. 202.)
2. It is a presumption of law that when a vessel is wrecked or founders at sea, shortly after sailing, without any stress of weather or storm sufficient to destroy or impair a sound ship, but she founders in ordinary sea-going weather, her loss is to be attributed to decay, or some inherent defect in her material; and the insurers, under such circumstances, are exempt from the risk. (*Id.*)
3. Where there is a conflict in the evidence as to the seaworthiness of a vessel, or the extent of perils encountered, it is proper for the court to submit those questions to the jury, as being questions of fact, for them to determine; and if the jury, after passing upon them, finds a verdict in favor of one of the parties, that disposes of the case, so far as the question of the weight of evidence is concerned. (*Id.*)
4. Where a policy of insurance was "for the account of whom it may concern," in case of loss the amount insured to be paid to the plaintiff or order: *Held*, that the action was properly brought in the name of the plaintiff; the contract being in substance with him, if authorized, for the benefit of all the owners. In such a case he has a right to sue on the policy as trustee for the owners, under the Code of Procedure. (*Id.*)
5. Where the loss, if any, was payable in thirty days after proof of loss and proof of interest in the vessel insured. *Held*, that it was not necessary that the particulars of loss should be stated in the preliminary proofs. (*Id.*)
6. The defendant, by an open policy, insured "H. C. & Co., on account of A. B. & Co. (the plaintiffs), and consigned to H. C. & Co. by regular invoice and bill of lading. In case of loss, to be paid to H. C. & Co., at and from San Francisco, via Isthmus, to New York. On specie, gold bars, &c, * * * laden or to be laden on board of steamers sailing from and after July 1, 1862." Gold bars, the property of the plaintiffs, of the value of \$12,000, shipped at San Francisco after July 1, 1862, were consigned to H. C. & Co. by regular invoice and bill of lading; but in the

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bill of lading S. & Co. were designated as shippers, and N. Bro's as consignees. *Held*, that the gold bars so shipped were covered by the policy; the expression in the policy, "consigned to H. C. & Co. by regular invoice and bill of lading," not demanding the insertion of the name of that firm in the bill of lading, as consignees, in order to cover any shipments. (*Block* agt. *The Columbian Ins. Co.* 3 *Robt.* 296.)

7. *Held*, also, that this construction was strengthened by proof of the existence of a custom among merchants in San Francisco, when shipping gold in less sums than \$30,000, to unite them in one shipment exceeding that amount, taking a bill of lading for the whole in the name of one person, to save charges. That the defendant was charged with knowledge of that custom, and the language of the contract was to be construed in reference to it. (*Id.*)
8. Where a policy of insurance provides for payment, by the insurers, "in case of loss, in thirty days after proof of loss," &c., service of proof of loss, and the expiration of thirty days thereafter, are conditions precedent to a right of action upon the policy. (*The Washington Marine Ins. Co.* agt. *Herckenrath*, 3 *Robt.* 325.)
9. And if, in action by the insurers upon a premium note, the defendants, admitting the allegations of the complaint, set up as a counter-claim a loss occurring under a policy issued by the plaintiffs, but give no evidence tending to show that proof of loss was ever served, the counter-claim should be disallowed. (*Id.*)
10. A mere change of ownership of the subject insured will not avoid a policy of insurance, provided there be an insurable interest at the time of loss, unless there be a clause in it making it void upon any change of ownership. And even a clause of that kind will not prevent the application of that rule, if the change of interest is merely from absolute owner to mortgagee. (*Fernandez* agt. *Great Western Insurance Co.* 3 *Robt.* 457.)
11. By the terms of a policy of insurance upon a vessel, it was expressly provided that the policy covered only the original interest subsisting when negotiated, and that any change of interest, in whole or in part, should cancel the policy. After the issuing of the policy, the insured sold the vessel, and two days afterwards, according to previous agreement, took back from the purchaser a mortgage upon the vessel, to secure the payment of a part of the purchase money, accompanied by a power of attorney, placing the vessel under the entire control of the mortgagees. *Held*, that the transfer did not terminate the interest of the insured, so as to release the underwriters. (*BARBOUR, J. dissented.*) (*Id.*)
12. A voluntary departure from the course of a voyage, without any excuse rendered therefor, although alight and unimportant, will discharge the underwriter. It is otherwise, if the departure is excused by a justifying cause. (*Id.*)
13. There cannot be a deviation from the usual course of the voyage, before it has commenced. (*Id.*)
14. And although underwriters are discharged, if a loss occur under a policy "at and from" a port of departure, while the vessel is absent from such port, for any unexpected purpose, before her voyage has commenced, yet they will not be absolved if the vessel returns in safety from such temporary absence, and is afterwards lost upon her voyage, after it has formally commenced. (*Id.*)
15. It being the duty of the assured to put his ship in complete condition for her voyage, to avoid the consequences of a breach of the implied warranty of seaworthiness, he has a right to adopt all suitable and usual means to put her in such condition, and determine by proper tests in advance of her sailing if she is sea-worthy. (*Id.*)
16. Accordingly *held*, that under a policy of insurance on a steam vessel "at and from New York to Havana," the making a trip with her to Elizabethport, before starting upon her voyage, for the purpose of trying the engine and ascertaining the draught of the vessel, with coal on board, neither of which objects could have been attained otherwise than by such actual trip, if a deviation at all, was sufficiently excused by the necessity of trying the engine and ascertaining the draught of the vessel when loaded. (*BARBOUR, J. dissented.*) (*Id.*)
17. An insurance of a cargo in bulk, "free of particular average," does not cover a total destruction of the thing insured, by perils insured against, if any of the articles comprising such cargo remain in specie. (*MCCUNN, J. dissented.*) (*Wallerstein* agt. *The Columbian Ins. Co.* 3 *Robt.* 528.)
18. The loss of a part of an assured's portion of a cargo insured in a valued poli-

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- cy, which cargo is partly lost by perils insured against, and the residue is brought to the port of destination, is *partial*, and not total, with benefit of salvage, notwithstanding only part of the portion so belonging to the insured is capable of being identified by any marks. So *held*, in a case where the assured notified the underwriters of his intention not to abandon his interest in the cargo, and the damage to the part saved from the perils insured against had been adjusted as a partial loss. (MONELL, *J. dissented.*) (*Sale agt. The Sun Mutual Ins. Co. 3 Robt. 602.*)
19. Where temporary repairs are made upon a vessel in a foreign port, by the insured, for the sole benefit of the insurers, and by their express consent and authority, to enable the vessel to be navigated to the port of destination, for the purpose of there making permanent repairs at less cost, the insurers must bear the whole expense of the temporary as well as the permanent repairs, although the amount, in the aggregate, exceeds the sum named in the policy. (*Alexandre agt. The Sun Mutual Ins. Co. 49 Barb. 475.*)
20. The clause in a marine policy of insurance, assuming the perils of men-of-war, pirates, rovers, arrests, restraints, detainments, etc., is qualified by the clause in the margin, "warranted free from loss or expense arising from capture, seizure or detention, or the consequences of any attempt thereat." The last statement is a warranty on the part of the assured. (*Swinnerton agt. Columbian Insurance Company, 37 N. Y. R. 174.*)
21. The capture of a vessel by authority of the Confederate States, during the late rebellion, is within this warranty, and relieves the insurer from liability. (*Id.*)
22. On a trial, where the insurance company showed that the insured vessel, while lying at a wharf in the port of Norfolk, Virginia, for repairs, was, on the 21st of April, 1861, seized by a large body of men, professing to act by the authority of the state of Virginia, filled with stones, towed out into the channel, with the cheers of the populace, sunk at the mouth of the channel, to prevent the ingress or egress of vessels of war; that it was a time of great confusion and excitement; that no relief could be obtained from the courts; and that the vessel was lost. *Held* :
23. (1.) That, upon these facts, in connection with the history of the times, it should have been left to the jury, as a question of fact, whether the seizure of the vessel was an act of war on the part of those then engaged in hostilities with the United States, or in aiding or carrying out existing or contemplated acts of war by the state of Virginia, or whether it was the act of a mob simply. (*Id.*)
24. (2.) That the Virginia ordinance of secession, adopted on the 17th of April, 1861, should have been received as evidence on that question. (*Id.*)
25. (3.) That matters of public history, affecting the whole people, are judicially taken notice of by the courts; that no evidence need be produced to establish them, but the courts act upon them from knowledge obtained from such sources as they rely upon. (*Id.*)
26. (4.) That the existence of civil war in our country is a fact which the court is bound to know; that knowledge of the main fact would carry with it knowledge of the particular acts which created war. (*Id.*)

INTEREST.

1. The general rule that where, by a written contract, money is to be paid at a fixed day, and the contract is broken, interest should be allowed, ought to be applied to interest payable semi-annually, according to the condition of a bond, especially where payment has been demanded. (*Howard agt. Farley, 3 Robt. 308.*)
2. If there is no evidence of a demand before suit, in such a case, then interest can only be recovered from the commencement of the action. (*Id.*)
3. When, in an action by a tenant for life of real estate, against a municipal corporation, to recover damages for injuries to buildings on such land by a mob, during a riot, the jury adopts, as part of the measure of damages, the value of such life estate, they are bound to add by way of damages interest upon such value thereto, from the time of the final demand upon the financial officer of such corporation. (*Greer agt. The Mayor, &c. New York, 3 Robt. 106.*)
4. Whether, if the jury ascertain the value of the plaintiff's in any other way than by estimating the value of the buildings, the plaintiff can claim interest as a right? *Quere.* (*Per MONELL, J.*) (*Id.*)

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IRRELEVANCY.

3. Where the object of the action was to *state the account* of the plaintiff with the *trust fund*, and to *discharge* the plaintiff *from the trust*; and accordingly the plaintiff, in the complaint, gave his version of the transaction, claiming to have paid over the whole amount into the hands of his co-trustee, except what he had paid over to the beneficiary of the fund, and showed how this had been done, and asked his discharge: *Held*, that it was competent for the defendants to falsify such statement, by the allegations in the answer, not only by a direct denial of the allegations in the complaint, but by *affirmative allegations*, showing a disposition and present condition of the fund different from that which the plaintiff insisted upon. And unless this object in the answer had been so clumsily and ineffectually accomplished, it was error to strike out a large portion of its allegations, as containing wholly irrelevant matter. (*McGregor* agt. *McGregor*, ante, 385.)
4. Upon a motion to strike out matters in an answer for *irrelevancy*, which is the only ground stated in the motion papers, the court ought not to consider, only incidentally any other question, such as whether the matter sought to be stricken out forms the whole or a material part of a defense or a counter-claim. These questions only properly arise upon demurrer, or on the trial of the action. (*Id.*)
5. As a general rule, the validity of a defense to an action is not to be tested by a motion to strike out. (*Id.*)
6. *Sham* and *irrelevant* defenses may be stricken out, and matter of the same description may be stricken out on motion, or may give occasion for a motion for judgment, notwithstanding the answer. But the matter must be *palpably sham* or *irrelevant*. (*Id.*)

ISSUES.

1. Issues involving a charge of fraud should be framed in so specific a form as to inform the party charged precisely what he is required to meet. (*Wood* agt. *Mayor, &c. of New York*, 3 *Abb. N. S.* 467.)
2. Form of issues, settled for jury trial, in an action by a municipal corporation to annul a lease procured to the corporation, on the ground of fraud practiced in procuring the corporate officers to enter into it. (*Id.*)
3. On the trial of issues of fact in an

equity case, the court, in the exercise of a sound discretion, may submit to the jury additional issues arising upon the proofs and material to the final determination. (*Farmers' and Mechanics' Bank* agt. *Joslyn*, 37 *N. Y. R.* 353.)

JOINT DEBTORS.

1. After a transcript of a judgment of the marine court for more than \$25, exclusive of costs, recovered in an action commenced by the service of process on one only of several defendants jointly indebted, has been filed in the office of the county clerk, the plaintiff may issue a summons in the New York common pleas (under section 375 of the Code of Procedure), to a joint debtor not served, requiring him to show cause why he should not be bound by the judgment. (*Ticknor* agt. *Kennedy*, 3 *Abb. N. S.* 387.)

JOINT STOCK ASSOCIATION.

1. The effect of the statutes of the state of New York relative to joint stock associations, when read together, is to give such associations all the qualities or attributes of corporations, except the right to have and use a common seal. (*Waterbury* agt. *Merchants' Union Express Co.*, 3 *Abb. N. S.* 163.)
2. Proceedings for the dissolution of joint stock associations, in cases of insolvency, are to be conducted mainly according to the methods employed in the case of insolvent corporations, and not according to those derived from the law of simple partnership. (*Id.*)
3. What facts will constitute a case of insolvency, such as will warrant the court, on the application of a stockholder in a joint stock association, in appointing a receiver and decreeing a winding up of the association. (*Id.*)

JUDGMENT.

1. The defendant served an offer, under section 385 of the Code of Procedure, to allow plaintiff to take judgment for a specified sum. The offer not being accepted, he served an answer setting up a counter-claim. On the trial the counter-claim was allowed, and the plaintiff recovered judgment for a sum less than the amount named in the offer. The aggregate, however, of the amount for which he recovered judgment, and the counter-claim extinguished by the judgment, exceeded the amount named in the offer: *Held*, that the plaintiff

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- was entitled to costs. The recovery was more favorable than the offer, inasmuch as it benefited the plaintiff by extinguishing the counter-claim, as well as by entitling him to the dominal sum awarded. (*Tompkins* agt. *Ives*, 3 *Abb. N. S.* 267.)
2. Where a sum of money had been paid on account of a judgment, to the original owner, before an assignment thereof to subsequent assignees, and without their knowledge; and such assignees assigned to a purchaser, for a consideration, not only the judgment itself, but also "all sums collected thereon," and all collateral securities therefor held by them or their attorney, or any one for their benefit, and in case of its prior payment, discharge or transfer, the proceeds or price of any settlement or sale of the same; but warranted to the purchaser their title thereto and power to transfer it to the extent of the consideration paid, only; and all their responsibility arising out of such assignment and warranty was to end in ninety days, unless within that time notice of the ground of their liability was given to them: *Held*, 1. That the second assignee could recover of the assignors the same proportion of the consideration money paid by him, and interest, as the amount paid to the original plaintiff in the judgment, on account of it, bore to the amount due on such judgment, and interest, but no more. 2. That this was an equitable rule, analogous to that applied to a purchase of a particular piece of real estate by measurement, when it falls short of the supposed area—being a case of mutual mistake, admitting of compensation, rather than a failure of title, or any internal and secret defect in the commodity sold. (*Furniss* agt. *Ferguson*, 3 *Robt.* 269.)
 3. There is no such thing permissible as an interlocutory judgment, in any case. The only judgment authorized or permitted by the Code is a "final determination of the rights of the parties to the action." (*Belmont* agt. *Pouvert*, 3 *Robt.* 693.)
 4. No judgment can now be considered as final, which expressly reserves any question whatever for future consideration and determination by the court. (*Id.*)
 5. A determination in writing, entered as a judgment, in which not only the question of costs is expressly reserved, but which contemplates and provides for further action by the court, upon the coming in of the report of a referee appointed by it, is not the final judgment of the court, but is at most an order, and will be vacated and set aside, on motion, so far as it purports finally to adjudicate and determine the rights of the parties. (*Id.*)
 6. But so much of it as orders a reference, may be permitted to stand, so as to save to the parties the trouble and expense of a re-examination of the witnesses upon questions which they have already answered. (*Id.*)
 7. In an action tried by a court without a jury, the only guide for the entry of the judgment by the clerk is the formal decision filed by the judge before whom it was tried, containing his findings of fact. (*Loeschigk* agt. *Addison*, 3 *Robt.* 331.)
 8. *So held* where merely certain conveyances and transfers were adjudged in a decision not to be void, and one to be void; and in the judgment entered an additional conveyance was adjudged to be void, a receiver was ordered to be appointed, to whom certain defendants were ordered to release their interest, and costs were awarded. (*Id.*)
 9. If the clerk, in entering the judgment, pursuant to section 267 of the Code of Procedure, deviates from the decision, the judgment must be set aside. (*Id.*)
 10. If such decision do not dispose of all the issues in an action, a new trial must be ordered. (*Id.*)
 11. After the trial of the issues in an action, an adjudication was made by a justice of this court, at a special term, allowing the plaintiff five days after notice thereof, to sign and file a stipulation containing certain matters, and in case the plaintiff should refuse to sign such stipulation, it was adjudged that the complaint should be dismissed, &c.: *Held*, that this adjudication, not being final until the expiration of five days after it was pronounced, there was not, at the time it was made, a final determination of the rights of the parties, from which on that day an appeal could have been taken; and that consequently it was irregular to file a judgment record in the action the same day. (*Butler* agt. *Niles*, 3 *Robt.* 644.)
 12. That in analogy to the old common law practice, the direction was a judgment nisi, or according to the equity practice, a decretal order, not a final decree. (*Id.*)
 13. *Held, also*, that after the expiration of the time given to the plaintiff, and non-compliance with the direction, no further action on the part of the court or any judge thereof, was necessary

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the defendant becoming entitled, by the very terms of the order, to judgment of dismissal. (*Id.*)

JUDICIAL SALE.

1. Although a *public judicial sale* of valuable city lots is not void because it takes place on an *election day* of a city charter election, yet, where it appears that, in addition to the fact that the sale was made on a day most unfavorable to a large gathering, and after a written notice to the referee from the defendant, the person to be most affected by it, that he would consider it "unjust and oppressive;" that the lots were sold in an order contrary to the defendant's directions and wishes, and apparently detrimental to his interests, and under circumstances which gave rise to apprehensions that free competition was interfered with, the sale will be set aside and a re-sale ordered. (*King* agt. *Platt*, ante, 23.)
2. A person at a judicial sale cannot be compelled to take title, when a person who, if living, would have an interest in the property, is not proven to be dead, merely because such person has been absent, unheard of, for seven years. The presumption of death, arising from such absence, is not a sufficient basis for the title. (*McDermott* agt. *McDermott*, 3 *Abb. N. S.* 451.)
3. A judicial sale of property in the city of New York on the day of the charter election is not for that reason void. A judicial sale is not the business of a court, within the meaning of the Revised Statutes, declaring that no court shall be opened or transact any business in any city or town on the day of elections. (1 *R. S.* 5th ed. 148, §§ 4, 5.) (*King* agt. *Platt*, 37 *N. Y. R.* 155.)
4. Where a party directly interested in the price which the property to be sold at a judicial sale shall bring requests that the sale shall not take place on election day, and that if it do so he would consider it "unjust and oppressive;" and also makes a reasonable request as to the order in which the parcels shall be sold, with a view to enhancing the price it may bring, which requests are disregarded without any apparent good cause, and the plaintiff bids in the property, the court, looking into these and similar circumstances, will be justified in setting aside the proceeding and ordering a new sale. (*Id.*)
5. Occupying a position of advantage, it behooves a plaintiff to pursue his rem-

edy with scrupulous care, not to inflict unnecessary injury on the party within his power; and it is the duty of a court to see that its process is not made unnecessarily oppressive. (*Id.*)

JURISDICTION.

1. The ninth section of "An act relating to the metropolitan board of health, and to the duties and powers of the commissioners of said board and the salaries of their subordinates, passed in 1867, provides as follows: "No preliminary injunction shall be granted against the metropolitan board of health, or of police, or its or their officers, or against the commissioners of said board in their capacity as a board of excise, or against the last named board, except by the supreme court, at a special or general term thereof, after service of at least eight days' notice of a motion for such injunction, together with copies of the papers on which the motion for such injunction is to be made." (*Burnham* agt. *Action*, ante, 48.)
2. *Held*, that this is a *public*, and not a private or local law, and, therefore, not exposed to the constitutional objection of containing other subjects than those expressed in its title. (*Id.*)
3. The act creating the metropolitan sanitary district is, essentially, a *penal law*, and therefore is a *public act*. (*Id.*)
4. This act of 1867, being constitutionally valid, it deprives this court of jurisdiction to hear any motion for an injunction against the boards and officers named in it. (*Id.*)
5. Courts of equity have jurisdiction to call upon executors and administrators to account. Such power was frequently exercised by the late court of chancery, although the surrogate had jurisdiction over such proceedings. (*Christy* agt. *Libby*, ante, 119.)
6. The court of common pleas of the city and county of New York has the same jurisdiction exercised by the late court of chancery in actions, when the defendant resides, or is personally served with a summons, within the city of New York. (*Id.*)
7. The Revised Statutes do not confer on the surrogate *exclusive* jurisdiction over proceedings to compel executors, administrators, or *collectors* to account; an action for such accounting may be brought in the court of common pleas of the city and county of New York. (*Id.*)
8. The *title* is a *part of the complaint*, but

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the allegations in the *body* of the complaint should control the *title*. (*Id.*)

9. The act entitled "An act to enable the board of supervisors of the county of New York to raise money by tax for the use of the corporation of the city of New York, and in relation to the expenditure thereof; and to provide for the auditing and payment of unsettled claims against said city, in relation to actions at law against said corporation," passed April 23, 1867, is a *public statute*, and need not be *pleaded* to give the court jurisdiction to notice it. (*Bretz* agt. *Mayor, &c. N. Y. ante*, 130.)
10. The supreme court has no power to grant an *injunction order* in one action, staying proceedings in another action pending in the same court; nor in another court having full jurisdiction over the subject matter. (*Schell* agt. *Erie Railway Co. ante*, 438.)
11. National banks doing business in one state are not, as such, exempt from liability to be sued in the courts of another state. (*Cooke* agt. *State National Bank of Boston*, 3 *Abb. N. S.* 339.)
12. A court of equity will not sustain a bill against parties residing within its jurisdiction, in respect of property and claims thereto which they hold merely as agents of a foreign government, over whom, upon general principles of international law, the courts could exercise no jurisdiction. The claimants in such case have no redress in the courts of justice of this country; but any wrong done them (if not a *casus belli*) must be subject of diplomatic negotiation between the government of the United States and the foreign principal. (*Leavitt* agt. *Dabney*, 3 *Abb. N. S.* 469.)
13. Neither the treaties of 1830 and 1860, between the United States and Turkey, nor the acts of congress respecting consuls, operate to confer upon American consuls residing in Turkey jurisdiction to adjudge civil causes. (*Dainese* agt. *Allen*, 3 *Abb. N. S.* 212.)
14. Where proceedings before an inferior tribunal are attacked collaterally, great latitude of construction is to be indulged in support of jurisdiction. (*Pratt* agt. *Bogardus*, 49 *Barb.* 89.)

JUSTICES' COURTS.

1. Where the complaint in a justice's court specifies several unlawful trespasses, upon certain lands of the plaintiff described therein, and the defendant interposes a plea of title as to a parcel of the lands only, the plaintiff may avoid

the plea by an amendment of his complaint. (*Shull* agt. *Green*, 49 *Barb.* 311.)

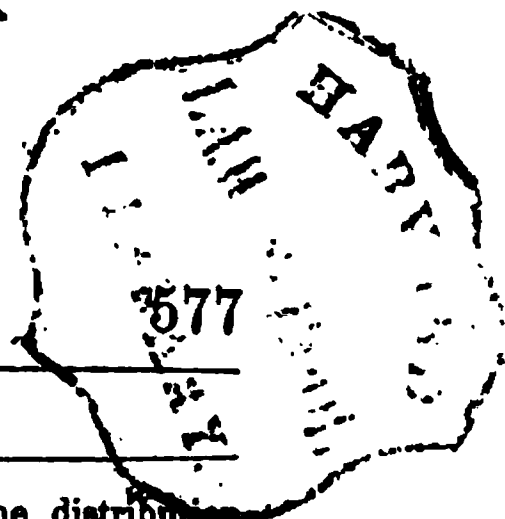
2. Where the defendant's plea of title covers only a parcel of the land, the justice may discontinue as to that parcel, and try the action as to the alleged trespasses upon the residue. (*Id.*)
3. Where, in such a case, the action was wholly discontinued by the justice, and the plaintiff, on a trial in the supreme court, upon the same state of the pleadings, recovered damages to an amount less than fifty dollars, for trespasses committed exclusively upon that portion of the premises *not covered by the plea of title*: *Held*, that the defendant, instead of the plaintiff, was entitled to costs. (*Id.*)
4. If the defendant is in the *actual possession* of a parcel of the lands described in the complaint, it is unnecessary for him to plead title thereto in a justice's court, as his possession will be a sufficient protection against any claim of the plaintiff for an unlawful entry or trespass on that parcel. (*Id.*)
5. A right of way across the land of another, for the purpose of going to and from a cemetery, is an easement—an interest in land—and affects the title to land; and such title cannot be tried in a justice's court. (*Alleman* agt. *Dey*, 49 *Barb.* 641.)
6. Where a summons in an action in a justice's court is returnable on the day of a general election, and there is no appearance, the justice acquires no jurisdiction—not even to adjourn the proceedings to another day. (*People ex rel. Monday* agt. *Schwartz*, 3 *Abb. N. S.* 395.)
7. A judgment entered upon such adjourned day may be reversed on *certiorari*. (*Id.*)

LANDLORD AND TENANT.

1. The provision of section 5 of subdivision 2, of the act of April 3, 1849, to amend the Revised Statutes, in relation to summary proceedings to recover the possession of land, which authorizes such proceedings, when instituted before a justice of the peace, to be removed by appeal to the county court, in the same manner and with like effect, as appeals from judgments of justices of the peace in civil actions, but directs that in case of appeal by the tenant, in order to stay the issuing of a warrant or execution, security shall also be given for the payment of all rent accruing

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- or to accrue upon the premises subsequent to the application to the justice, does not apply—so far as relates to a stay—to proceedings instituted against a tenant solely on the ground that he is holding over after the expiration of his term. (*Sage* agt. *Harpending*, 49 Barb. 166.)
2. That section of the statute does not create a right to stay the issuing of the warrant in a case where it did not previously exist, but it merely provides that in order to exercise the right to stay, in cases where it previously existed, security shall be given as therein prescribed. (*Id.*)
 3. An appeal to the county court, taken by virtue of the act of 1849, of itself, merely transfers the proceedings to the county court for the purpose of review, but does not affect the power of the justice to issue a warrant to enforce his judgment. (*Id.*)
 4. And a warrant so issued, being regular and valid, and the landlord having been put into possession of the premises by virtue of it, he is justified in using so much force as is necessary to defend himself and maintain his possession. (*Id.*)
 5. And in an action against him, by the tenant, for an alleged assault and battery committed in repelling the attempt of the tenant to re-enter, the only question for the jury is whether the defendant used an excess of force. (*Id.*)
 6. Even though it be assumed that a justice of the peace has not power to issue a warrant to dispossess a tenant after an appeal by the latter to the county court, yet his judgment, until reversed or set aside, is of force as an adjudication, and it determines that the lease has expired and the landlord is entitled to the possession of the premises. The fact that an appeal has been taken does not affect the conclusive nature of the judgment as a bar, while it remains unreversed. It is, therefore, erroneous to charge that the judgment ceased to be *res judica* when the appeal was perfected. (*Id.*)
 7. Where the landlord and owner in fee, claiming that the term has expired, enters without process and without force, during the temporary absence of the tenant, the latter has no right to take the law into his own hands and attempt to dislodge the former by force. The landlord being in the actual possession has a right to maintain it, and to use force, if necessary, for that purpose. (*Id.*)
 8. The fact that a tenant, against whom summary proceedings are instituted by the landlord, to recover possession of the premises, has a good defense to the proceedings, will not entitle him to a writ of prohibition to restrain the magistrate from entertaining the proceedings. (*The People ex rel. Bean* agt. *Russell*, 49 Barb. 351.)
 9. Although it be plain that the magistrate cannot, in conformity with law, decide in favor of the landlord, he is not thereby deprived of jurisdiction over the proceedings. (*Id.*)
 10. If the judge has jurisdiction of that class of proceedings, he cannot be prohibited from adjudging upon the question of the termination or expiration of the term. It cannot be assumed that he will pronounce an erroneous judgment. On the contrary, the presumption of law is, that he will decide correctly. (*Id.*)
 11. The tenant must await the decision; and if it be erroneous, he has his remedy by *certiorari*, or an action for damages. (*Id.*)
 12. Land cannot pass by a conveyance, as appurtenant to land. (*Matter of the N. Y. C. Railroad Co.* agt. *The Buffalo and N. Y. and Erie Railroad Co.*, 49 Barb. 502.)
 13. A lessor may maintain an action on a covenant in a lease of a furnished house executed by the lessee, to pay all damages accruing to the house or furniture during the term, notwithstanding an agreement contained therein, that such damages should be determined by a named person, where his appraisal of such damages may be void for want of notice of time or place of such appraisal. (*Morton* agt. *Cameron*, 3 Robt. 189.)
 14. It is a subject of defense and recoupment, in an action for rent, that premises demised for the purpose of keeping a respectable boarding house therein had been previously occupied, to the knowledge of the lessor, without disclosing it, as a house of ill-fame, and continued, after such demise, in consequence thereof, to be subject to nightly visits at all hours, from disreputable persons of both sexes, to the annoyance and disturbance of the tenant, and bringing reproach and disgrace upon herself and family, thus defeating the purposes and uses for which she rented the house, and forcing her to abandon her business therein. (*Staples* agt. *Anderson*, 3 Robt. 327.)
 15. Where, in such an action, the defend-



ant set up as a defense, the bad character of the house, arising from its former mode of occupation, which obliged her to abandon it; and the evidence tended to show that the plaintiff, although knowing that his house had a bad repute, did not disclose the fact to the defendant, but represented that the premises were "a good place" to let out furnished rooms to gentlemen: *Held*, that the question of fact as to the character of the house, at the time of the letting, being known to the plaintiff, and his false representations or fraudulent concealment thereof from the defendant, should have been submitted to the jury, instead of directing them to find a verdict for the plaintiff. (*Id.*)

16. Where an affidavit upon which summary proceedings to dispossess a tenant are founded is true, and in proper form to give jurisdiction, the proceedings regular and taken with the tenant's knowledge, and he omits to pay the rent claimed, and there is no allegation of either fraudulent representation or concealment by the landlord, to induce the tenant to abstain from paying such rent, in order to allow the former to avoid the lease by procuring a warrant of dispossession, any right of the tenant to an injunction order enjoining such proceedings can only rest either on a contract or an estoppel. (*Springsteen agt. Powers*, 3 *Robt.* 483.)

17. If the proceedings are regular and free from all fraud or surprise, and the warrant is obtained on notice to the tenant, and on his omission to pay the rent due, nothing short of a contract founded on a sufficient consideration, by the lessor, not to dispossess him by the warrant, or else, after removing him, to give him a new lease, upon definite terms, so as to confer a right to continue in possession, can prevent the legal consequences of issuing such a writ. (*Id.*)

LAPSE.

1. Where the testator devised certain parts of his real and personal estate to a brother and sister, who died during the lifetime of the testator, such portions or shares lapsed, and were to be disposed of as in case of intestacy. (*Gill agt. Brouwer*, 37 *N. Y. R.* 549.)

2. Where, by the terms of the will, one of the devisees, who was to take a life estate on the residue of the estate of the testator, died during the life of the testator, and no disposition was made of the inheritance by the will, when all the particular estate created by the

will had terminated, the distribution will be as in case of intestacy. (*Id.*)

LEASE.

1. A lease taken by A. in trust for a corporation thereafter to be formed creates, on the formation of such corporation, and upon its receiving an assignment of such lease, with knowledge of the terms upon which it was executed and received from the lessor by A., a liability in equity, on the part of such corporation, to pay the rent to the lessor; and such liability cannot be avoided by a transfer of the lease, by the corporation, to B. (*Van Schaack agt. The Third Avenue Railroad Company*, 49 *Barb.* 409.)

2. The Buffalo, New York and Erie Railroad Company, by a lease dated February 27, 1863, demised, for the term of 490 years, to the New York and Erie Railroad Company, "the railroad of the party of the first part, including its branch freight track, and all the land of the party of the first part situate within and from the city of Buffalo to and within the village of Corning * * upon or across which its said railroad, or any part thereof, or its machine shops, warehouses, freight or passenger depot buildings, car houses, engine houses, or other shops or buildings are constructed, within or between the places aforesaid, and all the rights, title and interest which the said party of the first part has in or to the use of any wharves or docks in said city, or in or to any other branch track or tracks used by or in connection with the said railroad, together with the appurtenances thereunto belonging." At the date of this lease a strip of land 240 feet in length by 30 in breadth, situate in Buffalo, the title of which was in the lessor, was in the actual possession of another railroad company, and had been for some ten years, and was used by the latter company for its tracks and other railroad purposes. It had never been used by the lessor in connection with the operating of its railroad, nor was it necessary for that purpose. *Held*, that the strip in question was not included in the description of the thing demised, viz., the "railroad" of the lessor; nor was it embraced by the words "all the lands" of the lessor "upon or across which its said railroad," &c., "are constructed," the railroad not having been constructed upon or across it; nor did it pass as an appurtenance to the railroad of the lessor. (*Matter of the New York Central Railroad Company agt. The Buffalo and*

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New York and Erie Railroad Company, 49 Barb. 501.)

3. A covenant, on the part of the lessees, in a lease, "to keep the buildings and fences in good repair, except natural wear and tear," binds them to rebuild in case of accidental destruction by fire or otherwise. (*McIntosh* agt. *Lown*, 49 Barb. 550.)
4. Where a lease contained seven distinct independent covenants, the third of which was to keep the buildings and fences in repair, and the seventh to build, during the continuance of the lease, 125 rods of fence: *Held*, that a former action by the lessor upon the last covenant, for not building the fence, was not a bar to an action subsequently brought upon the covenant to repair; the two covenants being distinct, and having no connection with each other, except that they were contained in and evidenced by the same instrument. (*Id.*)

LEGAL TENDER NOTES.

1. Legal tender notes, issued under the act of congress of February 25, 1862, are not exempt from state or municipal taxation. They are the money of the country, and liable to taxation, like the other money of the country. (*The People*, &c. agt. *The Board of Supervisors of New York*, 57 N. Y. R. 21.)

LEGISLATURE.

1. The act of 1866 (ch. 64), creating the "Metropolitan sanitary district of the state of New York," is constitutional. (*The Metropolitan Board of Health* agt. *Jacob Heister*, 37 N. Y. R. 661.)
2. The legislature have the power to establish new civil divisions of the state, embracing the whole or parts of different counties; and when so established, section two, article ten of the state constitution is not applicable to such divisions. (*The People* agt. *Draper* (15 N. Y. R. 532) affirmed and approved. (*Id.*)
3. Neither is the act referred to in violation of the provision of the constitution which declares that the "trial by jury, in all cases in which it has been heretofore used, shall remain inviolable forever;" nor of that article which provides that "no person shall be deprived of life, liberty or property, without due process of law." No property or person is injured by this act. (*Id.*)
4. A jury has not been the ordinary

tribunal to determine upon questions affecting the public health, prior to the adoption of the constitution of 1846. (*Id.*)

5. The power to be exercised by the board upon the subjects in question is administrative, rather than judicial, in its character. (*Id.*)

LIBEL.

1. Although, in actions for defamation, greater liberality is practiced in construing supposed defamatory words when they are spoken than when contained in written or printed articles, yet in both cases it is entirely a question of intent as to the sense in which they are used. (*Edsall* agt. *Brooks*, 3 Robt. 284.)
2. Although every one is presumed to use the words of a language in their ordinary import among all those who commonly employ it as a vehicle of ideas, yet, where some words have by local usage acquired a distinct and peculiar meaning, they may be presumed to have been uttered or published in that sense; and if such usage be averred in the pleadings, and evidence introduced to sustain it, the sense in which such words were used in a publication in that locality should be submitted to the jury. (*Id.*)
3. So *held* in an action for libel, upon a publication respecting the plaintiff, who had been a police officer, made by the defendants in a newspaper edited by them in the city of New York, headed "*Blackmailing by a policeman*," which consisted of a statement of a dismissal of the plaintiff as such policeman "on charges of *blackmail*, preferred against him by citizens in three distinct cases; of a detailed account of a receipt by the plaintiff, from three several persons designated by name, who had been defrauded of money, of sums paid by each of them voluntarily to him, for his aid as an officer in recovering such moneys; and an allegation of his trial upon charges preferred against him for such receipt before the Board of Metropolitan Police, and their consequent dismissal of him from office; where a local meaning of the word *blackmailing* corresponding with the plaintiff's conduct had been alleged by the answer, and sustained by evidence on the trial. (*Id.*)
4. The ordinary meaning of the word *blackmail*, and the decision in this case in 2 *Robertson*, 29, commented on and explained. (*Id.*)

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LIEN.

1. The statute of April, 1860 (*Sess. Laws 1860, ch. 446, p. 771*) only gives the keeper of a *boarding house* a lien upon and right to detain the baggage and effects of a boarder for the amount which may be *due by him*, to the same extent and in the same manner as inn-keepers have them. (*Shafer* agt. *Guest*, *ante*, 184.)
2. Thus limiting the lien to that for board *actually due*, and not including board to become due under an *agreement to board in future*. (*Id.*)
3. Nor can the act be extended to *any other indebtedness*, nor to any demand not due at the time of the detention. (*Id.*)
4. A *maritime lien* can only exist upon movable things engaged in navigation, or upon things which are the subjects of commerce on the high seas or navigable waters. (*Galena Packet Co.* agt. *Rock Island R. R. Bridge*, *ante*, 190.)
5. Such a lien may arise with reference to vessels, steamers and rafts, and upon goods and merchandise carried by them. But it cannot arise upon anything which is fixed and immovable, like a wharf, a bridge, or real estate of any kind. (*Id.*)
6. Though bridges and wharves may aid commerce by facilitating intercourse on land, or the discharge of cargoes, they are not in any sense subjects of maritime liens. (*Id.*)

MANDAMUS.

1. Upon the refusal of the county treasurer to issue his warrant for the collection of a tax, etc., a proceeding by mandamus is the proper remedy, and may be instituted by any citizen having a common interest in the collection of the tax. (*People* agt. *Halsey*, 37 N. Y. R. 344.)
2. The rule that a relator in a writ of mandamus must show an individual right to the thing asked does not apply to cases where the interest is common to the whole community. (*Id.*)
3. The granting or refusing of the writ of mandamus is a matter of discretion. To entitle a party to that remedy, there must be a clear legal right, not merely to a decision in respect to the thing, but to the thing itself. (*The People* ex rel. *Duff* agt. *Booth*, 49 Barb. 31.)
4. The court may exercise a discretionary power, as well in granting as in refusing

a mandamus; as where the end is merely a private right, and when the granting of it would be attended with manifest hardships and difficulties. (*The People* ex rel. *Hackley* agt. *The Croton Aqueduct Board*, 49 Barb. 259.)

5. This discretion should be exercised soundly, and in accordance with the peculiar circumstances of the case. (*Id.*)
6. The defendants issued proposals for the building of a stone tower, engine house, &c., under a statute giving them authority for that purpose. The relators were the lowest bidders for the work; but the defendants refused to award the contract to them, or to any one else, for the alleged reason that no appropriation to cover the expense existed; and that since the time the proposals were received they had materially changed and altered the design and character of the work to be done; and that they had decided that the public interests required that the work should be re-advertised and let under proposals framed in accordance with such alterations. *Held*, that the issuing of the notice inviting proposals did not, alone and of itself, bind the defendants to award the contract to the lowest bidder, or create any obligation on their part to award it at all; but that, if the bids were extravagant, or far beyond the amount of the contemplated expenditure, they might, in their discretion, reject them altogether. (*Id.*)
7. *Held, also*, that, under the circumstances, it would not be a proper exercise of judicial power to grant a *mandamus* to compel the defendants to award the contract for the work in question to the relators. (*Id.*)

MARATIME LIEN.

1. A *maritime lien* can only exist upon movable things engaged in navigation, or upon things which are the subjects of commerce on the high seas or navigable waters. (*Galena Packet Co.* agt. *Rock Island R. R. Bridge*, *ante*, 190.)
2. Such a lien may arise with reference to vessels, steamers and rafts, and upon goods and merchandise carried by them. But it cannot arise upon anything which is fixed and immovable, like a wharf, a bridge, or real estate of any kind. (*Id.*)
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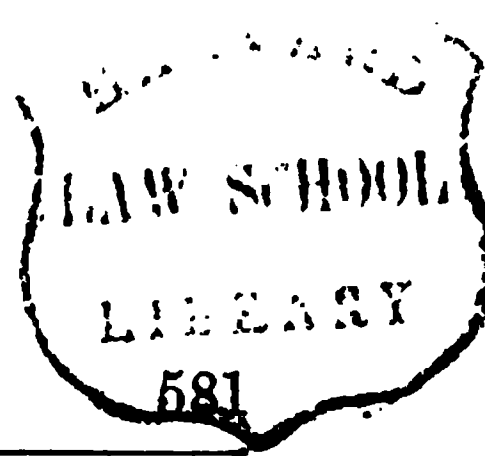
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MARRIAGE.

1. A defendant who has, by false representations, procured a marriage between himself and the plaintiff, when by law he was not competent to enter into the marriage contract, is liable to her in damage. (*Blossom* agt. *Barret*, 37 N. Y. R. 434.)
2. When by the statute the said attempted marriage is void, the plaintiff may maintain her action against the fraudulent husband without first procuring a formal annulment of the contract. (*Id.*)
3. When the action is for the fraudulently inducing the plaintiff to marry the defendant, and to cohabit with him, etc., and also for an assault and battery, each of which causes appear on the face of the complaint, the defendant failing to demur for a misjoinder, cannot take advantage thereof on the trial. (*Id.*)
4. By force of the act of April, 1848, for the more effectual protection of the property of married women, as amended in 1849, the disability of a married woman to hold and convey her separate estate is removed, and she is therefore not disabled by reason of her coverture from disaffirming her voidable deed of such estate. (*McIlvaine* agt. *Kadel*, 3 Robt. 429.)
5. A deed of trust executed by a married woman, while an infant, in conjunction with her husband, is voidable by her, on attaining her majority. (*Id.*)
6. If, after becoming of age, she executes an instrument under seal, revoking and annulling the deed of trust, and thereupon enters upon the premises and continues in possession, this will invest her with a good and complete title to the premises, notwithstanding her coverture. (*Id.*)

MARRIED WOMEN.

1. Where a married woman purchases real estate and executes a bond and mortgage to secure a part of the purchase money, on a foreclosure of the mortgage and sale of such property, her separate estate is chargeable in equity with the payment of any deficiency on sale. Her obligation arising from the execution of the bond, was for the benefit of her separate estate. And her separate estate, as a whole, becomes liable for any indebtedness contracted by her for its benefit. (*Ballin* agt. *Dillaye*, ante, 216; S. C. 37 N. Y. R. 35.)
2. The separate estate of a married woman is liable for a deficiency on a foreclosure sale of mortgaged premises which she purchased, and assumed to pay the mortgage as a part of the consideration for such purchase. (*This follows the decision in the case of Ballin* agt. *Dillaye*, ante, p. 216.) (*Flynn* agt. *Powers*, ante, 279.)
3. Where such married woman was an infant under twenty-one years of age, at the time she received the deed and assumed to pay the mortgage: *Held*, that her subsequent acts in conveying the premises with warranty of title and taking the purchaser's covenant to assume the same mortgage which she had assumed; and also her appearance by attorney in the foreclosure suit, and no question of infancy being raised, was an affirmation of the whole transaction which established her liability, free from any disability of infancy. (*Id.*)
7. The execution of the trust deed and the instrument of revocation by the husband is immaterial. As he has no estate or interest to convey, the wife's execution alone is sufficient. (*Id.*)
8. In an action upon a promissory note, by an indorsee, an answer alleging that at and before the making of the note the defendant was, and still is, a married woman, *prima facie* sets up a defense. (*Scudder* agt. *Gori*, 3 Robt. 661.)
9. Whatever disabilities have been removed by statute from married women, none has yet enabled her to give accommodation notes in exchange for others, so as to bind herself or her estate. (*Id.*)
10. The law permits a married woman to engage in trade, and renders her liable upon notes and obligations given by her in the course of her business; and does the same with her obligations, given with the intent to charge her separate estate, if intended to benefit such estate. (*Id.*)
11. Where, in an action upon a promissory note, the defendant sets up as a defense that she was and is a married woman, and introduces proof on the trial tending to establish the truth of the defense, evidence on the part of the plaintiff, showing that the defendant has sued and been sued separately in her own name, as a *feme sole*, and that there are numerous judgments against her individually, is admissible to prove that she was a *feme sole*. (*Id.*)
12. The acts of 1848 and 1849, for the more effectual protection of married



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women, did not remove the general disability of married women to bind themselves by contract. But the power of those statutes carried with it, also, the power to charge such estates substantially in the manner and to the extent previously authorized by the rules of equity in respect to separate estates. (*Ballin* agt. *Dillaye*, 37 N. Y. R. 35.)

13. The separate estate of the wife was chargeable in equity for any debt she might contract on the credit of or for the benefit of such estate; and under the provisions of the above statutes, it is now legally liable for such debts. (*Id.*)

MANUFACTURING CORPORATION.

1. In an action against a trustee of a manufacturing corporation incorporated under the general law of the state, to recover the penalty—the debt contracted by the corporation—for neglecting to file an annual report required by said act, the complaint is fatally defective where it does not allege that the debt was existing at the time the default was made by the trustees to file their report. (*McHarg* agt. *Eastman*, ante, 205.)
2. Where the complaint does not allege that the debt against the corporation is unpaid, or that it was unpaid when the trustees failed to make their report, but avers that the judgment (which was previously recovered against the corporation for the debt) and debt have been assigned to the plaintiff, and "there is now due to the plaintiff from the defendant the sum of \$899.04," the complaint held defective within the case of *Chambers* agt. *Lewis* (28 N. Y. R. 454). (*Id.*)
3. The complaint in such an action must also allege that the defendant was a trustee at the time of the default. An allegation that he has at all times been president of the corporation, although the president must be selected from the trustees, and is necessarily a trustee, is not sufficient as an allegation against him as trustee. The defendant must be sued as trustee, and not as president. (*Id.*)

MASTER AND SERVANT.

1. In an action for damages for a personal injury received by the plaintiff from the wadding of a cannon negligently discharged on board of a pleasure yacht of the defendant, by one of its crew, during the absence of the defendant,

and in violation of his positive general order, the plaintiff cannot sustain his action, where there is no evidence that the cannon was fired in the course of any employment or duty of the master of the yacht, but merely as a salute to another yacht, in passing. (*Haack* agt. *Fearing*, ante, 459.)

2. Neither can the action be sustained on the ground that in permitting the master of the vessel to have the possession and custody of the gun and ammunition, with other equipments of the yacht, the defendant became responsible for their careless use. Such possession and control cannot create or imply permission, much less authority or duty, to use them in the face of positive orders of the defendant to the contrary. (*Id.*)
3. The defendant, under the doctrine of liability of master and servant, would have been liable, if the sailing-master had injured a person or vessel by careless navigation of the yacht under his charge, as that would have occurred while performing the duty and ordinary employment of a sailing master. (*Id.*)
4. It could not be any part of the duty of sailing or taking care of the yacht, to discharge signal guns or give salutes. (*McCUNN*, J., dissenting: Holding that it became a part and parcel of the duties of a pleasure yacht crew, and a universal custom, to observe all those amenities and civilities which can by possibility pass between gentlemen able to afford such luxuries, and which are expected to be exchanged, such as salutations by displaying flags, firing guns, and exchanging other courtesies, &c.) (*Id.*)
5. Ordinarily an employer is not liable for injuries to one of his employees occasioned by the negligence of another employee engaged in the same general business. Such employees, on entering the service, take upon themselves, as an incident to the hiring, the ordinary risks and dangers arising therein, which includes the negligence or carelessness of their fellow servants. (*Faulkner* agt. *The Erie Railway Co.* 49 Barb. 324.)
6. No distinction arises from the different grades or ranks of the employees, nor from their being engaged in different kinds of work; provided the services tend to accomplish the same general purpose. (*Id.*)
7. An employer is, however, responsible for injuries to employees arising from his personal neglect, or from the want of ordinary care and prudence on his part, in the selection of employees. (*Id.*)

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8. A master is not liable to his servant for injuries sustained by the latter while using machinery, by reason of its imperfect construction, in the employ of the former, where the servant had the same means of knowledge of its safety as the master, and nothing occurred at or before the accident to indicate any danger, such as demanded or suggested precautions which were omitted. (*Loonam agt. Brockway*, 3 *Robt.* 74.)

MECHANICS' LIEN.

1. The lien which a contractor for the erection of a building acquires by filing a notice with the county clerk, under the mechanics' lien law (*Laws of 1851, ch. 513*), attaches only to the legal right, title and interest of the owner, then existing. If, previous to the filing of such notice, the owner has parted with his interest in the property, no lien is acquired. (*Ernst agt. Reed*, 49 *Barb.* 367.)
2. An appeal from a judgment under the mechanics' law stays only so much of the proceedings under the judgment as a judge of the court below, or a judge of the appellate court, shall order to be so stayed, until the hearing of the appeal. (*Van Olev agt. Abbott*, 3 *Abb. N. S.* 144.)
3. Under a judgment exempting property from a mechanic's lien, the lien may be discharged of record, notwithstanding an appeal, unless proceedings have been so stayed. (*Id.*)

MERGER.

1. The rule that, although there is a unity of two estates in one possession, yet no merger will take place if the circumstances show an intent to maintain the two interests distinct—applied in a peculiar case. (*Sheehan agt. Hamilton*, 3 *Abb. N. S.* 197.)

MORTGAGE.

1. A mortgage given by a railroad company to secure the payment of its bonds, a bond issued by the company, and a certificate indorsed thereon, stating that such bond is included in the mortgage, are all to be construed together as parts and parcels of the same security. (*Benjamin agt. The Elmira, Jefferson and Canandaigua Railroad Company*, 49 *Barb.* 441.)
2. A mortgage executed by a railroad company upon its railroad, with the lands, tracks, buildings, privileges and

franchises, "together with all the locomotives, tenders, cars, carriages, tools and machinery owned or *thereafter to be owned* by the company, or in any way appertaining to said road and to be used thereon," is valid in equity, in respect to subsequently acquired property; and a decree in a suit brought to foreclose the same, declaring such to be its effect, and directing a sale of all the property embraced therein, is a conclusive adjudication upon that point against all persons parties or privies in that suit. (*Id.*)

3. Persons made parties to a foreclosure suit as subsequent incumbrancers by judgment or mortgage, whose rights were already acquired, and existed at the commencement of the suit, are bound to set up their claims and assert their rights in that action, at the peril of being cut off and foreclosed, in respect to such claims. (*Id.*)
4. But if the decree in such action were not binding upon persons made parties as subsequent incumbrancers, the decision of the court upon questions raised and litigated by other parties, as to the validity and effect of subsequent incumbrances, is *res adjudicata*, and the question cannot be again litigated while such decision remains unreversed. (*Id.*)
5. If individuals are made parties defendants to a foreclosure suit as subsequent incumbrancers, that is sufficient, as respects the conclusiveness of the decree therein, whatever may be the nature of their liens. It is of no consequence that the plaintiff has made them parties as judgment creditors, when they hold a chattel mortgage upon the property. (*Id.*)
6. Where the owner of land purchases the same upon the foreclosure of a mortgage existing prior to his acquisition of the title, this will only give him a right of action on covenants in the deed to him to the extent of the amount paid by him to relieve the land from the burden of such mortgage, precisely as if no foreclosure had taken place. (*Cowdrey agt. Coit*, 3 *Robt.* 210.)

MORTGAGEE.

1. It is a general rule of courts of equity that, when anything is due to a mortgagee in possession, he will not be deprived of such possession by any appointment of a receiver. (*Bolles agt. Duff, ante*, 481.)
2. And particularly is this so when the mortgagee is responsible and is able to account for and pay any excess of rents

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and profits, after the payment of his debt, or will give security to do so. (*Id.*)

3. But where it appears that the mortgagee is irresponsible, or that the rents and profits would be lost or would be in danger of loss, or that the mortgagee was committing waste upon or materially injuring the premises, a different rule would prevail, and a receiver would be appointed. (*Id.*)
1. Where an interlocutory decree of a judge involves an adjudication that the mortgagee in possession, who is also appointed receiver, is entitled to remain in possession as such mortgagee until the coming in of a referee's report; although such adjudication would not prevent the court from removing him from his office of receiver, for proper cause shown, at any time before the coming in of such report, yet, if not as a matter *res adjudicata*, as matter of judicial decorum, it precludes his removal by any other judge of the court, for any cause existing *before such interlocutory order*, than the judge by whom such order was made. (*Id.*)
5. Where, on the rehearing of a motion, new facts are produced, which are amply sufficient to make a new case, the discretion of the court is properly exercised in rehearing it. (*Id.*)
6. A mere oral decision of a court is of no avail, without an *order* making it a record. (*Id.*)
7. An order is the only judicial mode of determining a motion; and it is dangerous, in any case, to rely on affidavits of parties, as to what a court has decided. (*Id.*)
8. A motion to vacate an order for examination of a witness, for irregularity, in that it was granted without notice, must specify that ground of irregularity; otherwise it cannot be urged upon the hearing. (*Brooks* agt. *Schultz*, 3 *Abb. N. S.* 124.)
9. Upon a motion to confirm a report of such commissioners, it is too late to object to a member of that body upon the ground of personal interest. Such objection is maintainable only on the hearing of the application for their appointment; and from an omission to make it at that time a consent to or waiver of the objection will be inferred. (*Matter of the Southern Boulevard*, 3 *Abb. N. S.* 417.)

MOTIONS AND ORDERS.

1. Where an objection is made to an *order to show cause*, that it was not made at a *regularly adjourned special term*, it will not be *presumed* that the order was made at a term *irregularly* held. (*People* agt. *Central City Bank*, *ante*, 428.)
2. Where the court has been regularly convened, it continues open till actually adjourned; an order for its continuance is not essential; and an order made by the court that it should so continue, is not necessary to be entered with the clerk; and if it was, it could be entered *nunc pro tunc*, in order to sustain otherwise regular proceedings had under the order. (*Id.*)
3. Where an *order* is properly granted by the court in an action or proceeding, the delay or omission of a clerk to make actual and speedy entry of it in the minutes of the court—as it is his duty, without any special directions to that effect—cannot be allowed to prejudice the substantial rights of parties. (*Id.*)
4. A motion to vacate an order of arrest does not embrace a motion to reduce the bail, although it includes an application for further or other relief. The questions involved in the two motions are entirely distinct, and dependent on different facts. (*Smith* agt. *Spalding*, 3 *Robt.* 615.)
10. An order placing a cause on the special calendar of short causes for trial, must be served on the adverse party, before the cause can be brought to trial under it. If service is omitted, an inquest taken under the order is irregular, and will be set aside on motion. (*Johnston* agt. *Green*, 3 *Abb. N. S.* 342.)
11. A motion to nonsuit, or a motion to dismiss a complaint, must distinctly specify the defects supposed to exist, or it will not be regarded in this court. A general objection is not sufficient. (*Bunsse* agt. *Wood*, 37 *N. Y. R.* 526.)

MUNICIPAL CORPORATIONS.

1. No member of a *municipal corporation* has the right to a *general inspection* of all documents in the hands of any *corporate official*, at all times and from any motive, or with any object or interest irrespective of the fact whether he has any personal interest in such documents, or any information to be derived therefrom. (*People ex rel. Henry* agt. *Cornell*, *ante*, 31.)
2. Such general inspection can be had only where the member has a private or personal interest in such documents

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- or the information to be derived therefrom. (*Id.*)
3. And this rule applies to a corporator who is also a member of a public association organized within the municipal corporation, and who makes application for such inspection on behalf of such association. (*Reversing this case, 32 How. 149.*) (*Id.*)
 4. The common council of the city of New York have power to create by ordinance public hackney coach stands. (*Masterson agt. Short, ante, 169.*)
 5. Such ordinance, however, is no defense to an action brought to restrain an improper use thereof, by blocking up a street, creating a private nuisance, so that a person is prevented from having free access to and from his property. (*See decision S. C. 33 How. Pr. R. 481.*) (*Id.*)
 6. The lessees of the wharfage of a public pier from the corporation of the city of New York, where in the lease is assigned the wharfage which shall or may arise or accrue during the time covered by the lease, the lessees agreeing to keep the premises in repair, are liable for an injury arising during the lease, by which a horse is backed off the pier and drowned, in consequence of neglect to keep the string pieces thereon in proper repair. (*Radway agt. Briggs, ante, 422.*)
 7. It was error for the court below to non-suit the plaintiffs, on the ground that they had not shown that the defendants (the lessees) were in possession, under their lease, of the premises in question, at the time of the injury. (*Id.*)
 8. The naked right to collect wharfage, which was all that the defendants possessed in this case, is incorporeal in its nature, and is incapable of any other or different possession than grows out of the right itself, and is incident thereto, and which attached by force of the agreement which originated it immediately on its execution and delivery. (*Id.*)
 9. The defendants were not entitled to the exclusive physical possession of the pier by the terms of their lease; neither was it in the power of the corporation to grant it to them. A public pier is a part of the public highway, and must be devoted to the public use. (*Id.*)
 10. In case of a village or city, where the trustees, or common council, are made commissioners of highways, the corporation is liable for their negligence in not repairing the highways within the corporate limits. (*Clark agt. The City of Lockport, 49 Barb. 580.*)
 11. Where a street in a city was in an unsafe condition, so that a person knowing its condition would have been guilty of negligence in attempting to use it by driving through it, but the danger was concealed by a snow that had recently fallen; it was held, that a traveler was not bound to know that water crossing the street had congealed into ice, which was covered by the snow; and he was not, therefore, chargeable with negligence in attempting to pass along the street, with his horse and buggy. (*Id.*)
 12. And the referee having found that the plaintiff had sustained damages by a fall, caused by the dangerous condition of the street, and the negligence of the city in not putting and keeping the street in proper repair, and that he was free from negligence or fault, a judgment in favor of the plaintiff, against the city, was affirmed. (*Id.*)
 13. A public or municipal body is as subject as private persons or corporations to liability for benefits received and accepted under an executed contract, although voidable, or even void. (*Harlem Gas Light Co. agt. The Mayor, etc. of New York, 3 Robt. 100.*)
 14. The statute authorizing a municipal corporation to grade or improve its streets, and to assess the expense among the owners and occupants of lands benefited by the improvements, in proportion to the amount of such benefit, is constitutional. (*Howell agt. City of Buffalo, 37 N. Y. R. 267.*)
 15. The fact that the assessment is made after the improvement has been made and paid for by the city, and the owners of property are enjoying the benefits thereof, for the purpose of reimbursing the city, etc., does not render the assessment unconstitutional. (*Id.*)
 16. The levying and collecting of taxes is not within the meaning of the clause of the constitution which provides that private property shall not be taken for public use, without just compensation. (*Id.*)
- ### MURDER.
1. An indictment, charging the offense of murder to have been committed willfully and of malice aforethought (omitting the words "with premeditated design"), and a general verdict of guilty, followed by a sentence of death, will be sustained, since the statute of 1862,

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as before. (*Fitzgerald* agt. *The People*, 37 N. Y. R. 413.)

2. By the statute of 1862, the law of murder was altered in two respects only, viz.: First, by the Revised Statutes, the killing was murder "2. When perpetrated without any design to effect death, by a person engaged in the commission of a felony." By the statute of 1862, this was only murder "when perpetrated in committing the crime of arson in the first degree." Second the crime of murder in the second degree was created and that offense consists in a killing, without a design to effect death, by a person engaged in the commission of any felony. (*Id.*)

3. It is the duty of the judge, at the trial, to explain to the jury the law of murder in its different degrees, and the law of manslaughter, and of the jury to render such verdict as shall be required by the evidence. Unless there is some objection in the record it is assumed that this is done, and that the verdict is in accordance with the evidence. (*Id.*)

4. The case of *The People* agt. *Knack* (3 Wind. 139) cited and approved. (*Id.*)

NEGLIGENCE.

1. A railroad passenger has a right to a seat in the cars, and it is the duty of the railroad company to provide him with one. (*McIntyre* agt. *N. Y. C. & H. R. Co.*, ante, 36.)

2. If, in discharging that duty, the company require the passenger to perform an act which is perilous in itself, in passing from one car to another, in a dark night, when the cars are in motion, and in doing which the passenger loses his life, the negligence, if any, which that act involves, should be imputed to the company alone. (*Id.*)

3. Thus, where the railroad company, on arriving at a station, in the evening, detached and left the rear car, notifying the passengers therein to go into the next car forward, and after a stoppage of some ten or twelve minutes the cars moved on, when one of the employees of the road, discovering a number of passengers standing in the rear car, said, "go forward, there are plenty of seats forward, go forward, if you want seats;" some of the passengers then went forward, among them the plaintiff's intestate, a lady, who undertook to carry a bundle, basket, basket and flower pot, and in stepping from one car to another, fell between them and was killed;

4. Held, that the rule that contributory negligence will prevent a recovery by the party suffering the injury ought not to be applied to such a case. (*Id.*)

5. The lessee of the wharfage of a public pier from the corporation of the city of New York, where in the lease is assigned the wharfage which shall or may arise or accrue during the time covered by the lease, the lessee agreeing to keep the premises in repair, are liable for an injury arising during the lease, by which a horse is backed off the pier and drowned, in consequence of neglect to keep the string pieces thereon in proper repair. (*Madway* agt. *Briggs*, ante, 122.)

6. In an action for damages for a personal injury received by the plaintiff from the wadding of a cannon negligently discharged on board of a pleasure yacht of the defendant, by one of its crew, during the absence of the defendant, and in violation of his positive general order, the plaintiff cannot sustain his action, where there is no evidence that the cannon was fired in the course of any employment or duty of the master of the yacht, but merely as a salute to another yacht, in passing. (*Knack* agt. *Farney*, ante, 439.)

7. Neither can the action be sustained on the ground that in permitting the master of the vessel to have the possession and custody of the gun and ammunition, with other equipments of the yacht, the defendant became responsible for their careless use. Such possession and control cannot create or imply permission, much less authority or duty, to use them in the face of positive orders of the defendant to the contrary. (*Id.*)

8. The defendant, under the doctrine of liability of master and servant, would have been liable, if the sailing master had injured a person or vessel by careless navigation of the yacht under his charge, as that would have occurred while performing the duty and ordinary employment of a sailing master. (*Id.*)

9. It could not be any part of the duty of sailing or taking care of the yacht, to discharge signal guns or give salutes. (*McCURRAN, J., dissenting.*) Holding that it became a part and parcel of the duties of every yacht crew, and a universal one to observe all these amenities and which can by possibility pass to gentlemen able to afford such luxuries and which are expected to be exchanged, such as salutations by displaying, firing guns, and exchanging written, &c.) (*Id.*)

10. The failure of a towing company to

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- locate a canal boat, in a fleet of boats to be towed, in the particular place agreed upon, does not relieve the other party from the necessity of care and attention on his part. (*Milton agt. Hud. R. St. Bt. Co.* 37 N. Y. R. 210.)
11. Contributory negligence on the part of the loser is a defense to such a claim. It is no answer to say that the party may have known his crew to be careless, and wished to guard against their negligence. This could only be a defense when the tower had expressly agreed to be responsible for the loss arising from the negligence of the servants of the other party. (*Id.*)
 12. The principle of contributory negligence applies both in cases of contract and of tort. (*Id.*)
 13. The defendant agreed to tow the plaintiff's boat from Albany to New York, and to place her between two deck boats. He placed her in an outside position. By storms and waves, her cargo was lost and damaged to an extent which would not have occurred had she been placed in the position agreed upon. The referee also found that the plaintiff did not exercise proper care over the boat in the position in which it was placed, and that the loss resulted from such want of care. *Held*, that the plaintiff could not recover. (*Id.*)
 14. The right to collect wharfage by the corporation of New York city carries with it the correlative duty of keeping the wharves in repair, and the legal transfer of this right to another party subrogates such party to the performance of such duty. (*Radway agt. Briggs*, 37 N. Y. R. 256.)
 15. Where the corporation had transferred by lease to defendant the right to collect wharfage, for the period of five years, the lessee to keep the wharf in repair during the time, *held*, that defendant was liable for all damages resulting, etc., from a neglect to keep such wharf in repair. (*Id.*)
 16. *Held*, defendant liable for the value of a horse, cart and load of merchandise, which, for want of a suitable guard, had been lost by backing off the wharf into the river. (*Id.*)
 17. It is not negligence, in law, for a passenger to follow the direction given by a servant of a railroad company, and to pass from one car to another, while the same are in motion, for the purpose of finding a seat. Whether, in such case, it was negligence, is a question for the jury. (*McIntyre agt. New York Central Railroad Company*, 37 N. Y. R. 287.)
 18. As to pecuniary injuries sustained by the next of kin in case of death by negligence, the statute has set no bounds to the sources thereof; and they may be such as arise from the loss of personal care, intellectual culture or moral training, which would have been received had the deceased lived. (*Id.*)
 19. The question, "what did the deceased usually earn?" is proper, as being an inquiry of importance in forming an estimate of the pecuniary loss sustained by the next of kin. (*Id.*)
 20. Where the streets or sidewalks of the city of New York are out of repair, through the neglect of the corporation, it is liable to an action for such neglect, at the suit of a person injured, whether the injury arises from some act done by the corporation, or from an omission of duty on their part. (*Davenport agt. Ruckman*, 37 N. Y. R. 568.)
 21. On the question of the plaintiff's contributory neglect in producing the injury, she being partially blind, the question, "was it so improper for her to have gone into the street unattended, in her then condition of sight, that it would be negligence on her part to do so, sufficient to prevent her from receiving compensation for an injury she might sustain from the negligence of others, while passing along the street?" was properly submitted to the jury. (*Id.*)
 22. The streets and sidewalks are for the benefit of all conditions of people, and at all times, by those whose vision is imperfect, and in the night time, and in reliance upon the belief that the corporation keeps them in a safe condition. If they are not in such condition, the corporation is responsible. (*Id.*)
 23. Whether the plaintiff's sight was such that she could walk the streets with "a reasonable assurance of safety," was a fair test of capacity to be submitted to the jury. (*Id.*)
 24. The owner of the house, whose duty it was to keep a passage way in repair, and who allowed it to become and to remain in a dangerous condition, is also liable to a person who receives an injury from such neglect. (*Id.*)
 25. In an action to recover damages for injury caused by the negligence of the defendant, no difficulty arises from making a distinction between gross and ordinary negligence, so far as the plaintiff is concerned, since any negligence

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- on his part deprives him of all right of action. (*Ginnon* agt. *The New York and Harlem Railroad Company*, 3 *Robt.* 25.)
26. The doctrine that negligence is a pure question of law, when the facts constituting it are conceded, and must therefore be determined by the court, was early admitted, and has been constantly adhered to, in the jurisprudence of this state. (*Per ROBERTSON, Ch. J.*) (*Id.*)
27. The refusal or neglect of the driver of a street railway car to stop the same, so as to enable a passenger to descend safely, will not justify the latter in incurring an extra hazard, by descending from the car while it is in rapid motion. (*Id.*)
28. The fact that multitudes daily step in safety from railroad cars while the latter are in motion, does not necessarily relieve such act from the imputation of negligence, even when done with care. If there be no danger in such act, unless carelessly done, and the constant practice of mankind is proof thereof, the servant of the company will still be justified in recommending a passenger not to descend while the car is in motion, although the latter asks him to stop. (*Id.*)
29. If there is any danger in such an act, the passenger is as much bound to avoid it, as the railroad company are not to contribute to its occurrence. They are not responsible for the consequences of his own voluntary act. (*Id.*)
30. In estimating the elements of danger, an injured party may be absolved from an imputation of negligence by surprise created by noise, bustle, hurry and confusion. But only in case there was a rate of speed within which an attempt to step off cars in motion might safely be made, with ordinary caution, would any surprise which prevented the discovery of, or a mistake as to, the time when such degree of speed was reached, relieve the passenger from the charge of negligence in selecting an improper time to descend. (*Id.*)
31. In an action to recover damages for an injury to the person, occasioned by the negligent act of another, the plaintiff must be free from any fault which may have contributed to the injury. (*Baxter* agt. *The Second Avenue Railroad Co.*, 3 *Robt.* 510.)
32. There are no degrees in negligence; for, whether it be great or small, if it can be seen that, in any measure, without it, the injury would not have happened, there can be no recovery. (*Id.*)
33. No general principle can be established as to the criteria or essence of negligence; there being so many different elements which, of necessity, must enter into it, and vary it. (*Per MONELL, J.*) (*Id.*)
34. In an action against a railroad company, to recover for personal injuries sustained by the plaintiff, in being run over by one of the defendants' cars, in the street, there is no error in a charge of a judge to the jury, on the trial, that if the plaintiff was guilty of "a want of common ordinary care or prudence," then she was guilty of negligence; and that if they found that the plaintiff exercised "common ordinary care and prudence," in going across the street, at the time, and under the circumstances which existed in the case, "then she was free from fault." (*Id.*)
35. Unless the evidence of negligence on the part of the plaintiff, in such an action, be of such a nature as to require the reversal of a verdict if found against it, it would be improper to take the question from the jury. (*Id.*)
36. If there be time for a person to cross a railroad track before an approaching car thereon could arrive, he is not bound in order to avoid the charge of negligence, to wait until the car has passed, because there might be danger of his slipping or falling. (*Id.*)

NEW TRIAL.

1. The provision of 2 *Rev. Stat.*, 145, section 40,—that in actions for divorce on the ground of adultery, the court may, if the offense charged is denied, award a new or further trial as often as justice shall seem to require,—was intended to award a new trial of the issue upon the charge of adultery; and does not relate to the trial of any other issue. (*Amory* agt. *Amory*, 3 *Abb. N. S.* 16.)
2. The statute does not authorize a new trial to be granted to a plaintiff whose action was dismissed upon the first trial for her failure to prove her marriage with the defendant. (*Id.*)
3. The provision of section 3 of, *Laws of 1855*, 613, ch. 337,—that on writ of error to review a conviction for a capital offense, the appellate court may order a new trial if "satisfied * * * that justice requires a new trial, whether any exception shall have been taken or not in the court below,"—does not permit an appellate court to disregard an

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error adverse to the prisoner, committed in the proceedings below, upon the ground that upon the whole case the guilt of the prisoner is clear. (*O'Brien* agt. *People*, 3 Abb. N. S. 368.)

4. That act was intended to enable the courts to grant a new trial asked on behalf of a prisoner, notwithstanding technical omissions by his counsel on the trial; it does not authorize them to disregard any errors, which, prior to its passage, would have entitled a prisoner to a new trial. (*Id.*)
5. The power conferred on the court of appeals by *Laws of 1855*, ch. 337, as amended *Laws of 1858*, ch. 330,—to grant a new trial in certain criminal cases, although no exception was taken below,—is confined to cases tried by the court of general sessions for the city and county of New York. It does not extend to causes tried in a court of oyer and terminer. (*McKee* agt. *People*, 3 Abb. N. S. 216.)
6. A new trial may be granted on the ground of *inadvertence* and *surprise*, at the trial, where the plaintiff shows that he had believed the instrument under which he claimed was an *agreement*, and was surprised by the ruling of the judge that it was a *mortgage*, requiring a different revenue stamp from that affixed thereto, and he was not then prepared to meet the objection. (*Hoppock* agt. *Stone*, 49 Barb. 524.)

NEW YORK CITY.

1. The corporation of the city of New York are not authorized, since the passage of the act of the legislature of May 4, 1866 (*Laws of 1866*, ch. 876), to contract for lighting the city with gas, for a period beyond one year, nor for an amount larger than the sum appropriated by that act to the specific purpose of lighting the streets for the year, 1866. (*Pullman* agt. *The Mayor, &c. of New York*, 49 Barb. 57.)
2. A contract on the part of the corporation which is to extend over a period of twenty years, though void, would, if made, confer rights of property, and the fact of its having been entered into might present embarrassment in the way of its being subsequently set aside. The preventative remedy by injunction may therefore be adopted, under such circumstances. (*Id.*)
3. Under the act of the legislature "relative to the public health in the city of New York," (passed April 10, 1850,) giving to the corporation of the city

authority to make all such by-laws and ordinances as they shall from time to time deem necessary and proper for the preservation of the public health, and also for the abatement and removal of nuisances," &c. (*Laws of 1850*, p. 608, § 2), the common council were authorized to pass the 7th section of the city ordinances of 1859, which directs the city inspector to "cause all dead animals, &c. found in any street or other place within the city to be removed and disposed of by removal beyond the limits of the city," &c.; such ordinance having been deemed necessary and proper by the city corporation, for the preservation of the public health. (*BARBOUR, J. dissented.*) (*Underwood* agt. *Green*, 3 Robt. 86.)

4. The city inspector has power, by the laws of the state, and the ordinances of the common council, with the consent of the board of aldermen, to appoint health wardens, and such other officers as the common council or board of health shall direct, to carry into effect the rules and regulations of that board and the laws and ordinances of the common council, relating to the public health. (*Id.*)
5. Whenever dead animals are found in any street or other place in the city, a case is presented for the exercise of the judgment and discretion of the city inspector, and he is bound to act. This is a duty imposed by law, is imperative, and in its nature judicial. For an error of judgment in the performance of that duty, while acting within his jurisdiction with power to determine, he is not liable to a civil action. (*Id.*)
6. Any one who acts under the orders of the proper officer, in effecting a removal, stands precisely in the same position as the city inspector, and therefore is not liable in a civil action. (*Id.*)
7. It is well settled that a public officer is not responsible, in a civil suit, for a judicial determination in a matter over which he had jurisdiction, however erroneous it may be, or however malicious the motive which produced. (*Id.*)
8. The passage by the common council of the city of New York, in the year 1855, of a resolution which permitted the plaintiffs (a company formed under the general act of 1848 (*Sess. Laws N. Y. 1848*, p. 48), authorizing the formation of gas light companies), to lay main gas pipes in a certain designated district in such city; upon condition of forthwith laying them, and of supplying thereby, within two years, gas to be used by the corporate authorities of

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- such city or private consumers, but reserving the right of revoking such permission for cause, together with the acceptance by the plaintiff of such permission, with all its conditions and reservations, constituted a valid and binding contract on the part of the plaintiffs. (*The Harlem Gas Light Co. agt. The Mayor, etc. of New York*, 3 Robt. 100.)
9. The obligation incurred by gas companies formed under such act, to perform all conditions and observe all restrictions annexed by municipal authorities to their consent, under such act, for laying gas pipes within the limits of their jurisdiction, when the former accepted such consent, formed a consideration for a contract by such municipal authorities, and the authority to impose such conditions and restrictions, on the grant of such consent, coupled with the duty of such municipal authorities to light streets and highways, operated as a grant to them of power to make a contract for the discharge of such duty. (*Id.*)
10. By their acceptance of such consent, the plaintiffs, who were a company formed under such act, were bound, under the penalty of having their license revoked, to supply gas to be used by the defendants, as directed by their ordinances, until such license should be revoked. (*Id.*)
11. The defendants were not rendered liable to the plaintiff for a higher price for gas furnished and lamps lit, than that fixed by a written agreement between them, for furnishing such gas and lighting such lamps for one year, by a mere notice from the plaintiffs that they would in future charge such higher price, when by such contract the defendants were entitled to lay mains in all the streets of a designated district, to which the plaintiffs were required to attach lateral pipes, so as to light public lamps; and where the former had, from time to time, ordered lamps to be placed by the latter at certain places, furnished them, and caused them to be put up and lighted under the direction of one of their officers (the superintendent of lamps and gas); but had only paid monthly for six years, the price fixed in such written contract. (*Id.*)
12. Such written contract did not annul the previous contract made by the passage of the resolution by the defendants, and its acceptance by the plaintiffs, but was merely auxiliary to it, in fixing the compensation, and after its termination the price was left to be ascertained by the value of the gas consumed. (*Id.*)
13. After the expiration of the time fixed in such written contract, the prior general contract remained in force, binding the defendants to pay for all gas consumed under their direction, according to its reasonable value, notwithstanding it was not founded on sealed proposals, pursuant to public notice, or given to the lowest bidder. An advertisement for such sealed proposals was not necessary where there was but one gas company in the district proposed to be lighted. (*Id.*)
14. The notice of charging a higher price than that specified in the written contract, not having been assented to, or acted upon by the defendants, could not bind them. Being liable under an existing contract only for the reasonable value of the gas consumed, the defendants could not be deemed to have acquiesced in any other standard of compensation from their mere silence; but having received, accepted and consumed the gas supplied to the public lamps by the plaintiffs, at their request, they are liable therefor on a *quantum meruit*. (*Id.*)
15. The statutes of 1857 (*Sess. Laws N. Y.* 1857, ch. 446), and 1861 (*Id.* 1861, ch. 308), regulating the mode of making contracts by the defendants, do not expressly exclude all other modes of making a contract. (*Per ROBERTS, Ch. J.*) (*Id.*)
16. In making contracts by the corporation of New York, prescribed forms must be observed by the functionaries who make them on their behalf. Hence contracts for work, or supplies, must be founded on sealed proposals, made in compliance with previous notice, and properly published, and must be given to the lowest bidder. The contracts of such corporation which fail to pursue these designated forms, are void. (*Taylor agt. Bebes*, 3 Robt. 262.)
17. This doctrine is applicable to, and controls, the duty of the corporation to make leases of its public property by public auction. All leases must be made in the mode designated by law; and if the corporation attempts to exercise a power not conferred by law, or to act in disregard of restrictions imposed upon it, its acts are void. (*Id.*)
18. Whether the power of the corporation to lease its wharves to individuals is exercised by it as an aggregate municipal body, or through the means of

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some delegated agent, its obligation to follow all forms designated by law and statutory provisions is equally incumbent. (*Id.*)

19. Where a public wharf, leased by the comptroller, is not let by public auction, as required by law, the lessee acquires no right, under the lease, to collect the wharfrage. (*Id.*)

20. Such a case is not aided by those revised city ordinances of the corporation (art. 4, §§ 27 and 28), which merely authorize the comptroller, in conjunction with the commissioners of the sinking fund, to lease the corporate property whenever in their judgment it may be advisable to do so, but also require those officers to conform such leasing to the provisions of the city charter. (*Id.*)

21. A mortgagee of land, not in possession, who does not establish any ultimate injury to the security of his debt, by the destruction of a building on the mortgaged premises by rioters, is not entitled to recover the value thereof, in an action against the city in which the premises are situated, under a statute making it liable for injury done by rioters. (*Levy agt. The Mayor, &c. of New York*, 3 *Robt.* 194.)

22. The common council of the city of New York have the power to establish and regulate stands for hackney coaches in the streets and public places of the city, and persons keeping or occupying such stands within the permission or license given by the common council, and who are not misusing the privilege given them thereby, cannot be restrained by injunction, on the ground of injury caused by their competition to the business interests of the plaintiff. (*Masterson agt. Skort*, 3 *Abb. N. S.* 154.)

OFFER OF JUDGMENT

1. Where a justice of the peace, under the provisions of section 371 of the Code, and after a written acceptance of an offer, upon appeal, to allow judgment for a certain sum, "makes a minute thereof in his docket, and corrects such judgment accordingly," but refuses to allow disbursements and costs in the court below to the appellant, the appellant may apply to the county court by motion and have such costs taxed and judgment entered in his favor for the amount in the county court; and an appeal can be taken therefrom to the supreme court. (*Ponto agt. Phelps, ante*, 364.)

OFFICERS.

1. A commissioner appointed by special statute to award damages for property taken in laying out a highway is not rendered incompetent from the fact of his owning land which has been taken for the improvement. A commissioner is a quasi judicial officer only, and is not within the application of the maxim precluding a person from acting as judge in his own case. (*Matter of the Southern Boulevard*, 3 *Abb. N. S.* 447.)

2. The sureties of a public officer are not discharged from liability on the bond, by legislation subsequent to the delivery of the bond, which modifies the duties of the office, for the faithful performance of which by their principal the bond was given. (*People agt. Vilas*, 3 *Abb. N. S.* 252.)

3. The bond of a public officer is understood to be given subject to exercise of the constitutional power of the legislature to change the duties of the office; and the obligation of sureties extends to the faithful performance of the duties as they may from time to time be modified. (*Id.*)

4. The fact that the bond, in a particular case, refers to a particular statute, as prescribing the duties of the officer, makes no difference. (*Id.*)

5. An office in this country is not property, nor are the prospective fees the property of the incumbent. The right to fees does not grow out of any contract between the officer and the government, but from the rendition of the services. (*Smith agt. Mayor*, 37 *N. Y. R.* 518.)

6. A deputy street commissioner of the city of New York, who had been kept out of his office, and had not performed its duties, cannot maintain an action against the city to recover the amount of fees accruing from the office. (*Id.*)

7. An officer executing a warrant of dispossession is not bound to delay its execution on account of a storm, even though the goods removed are liable to great injury by exposure to it. (*Hickenbotham agt. Lowenbein*, 3 *Robt.* 22.)

OYER AND TERMINER.

1. The statute makes it the duty of the judges of the supreme court of each district to appoint the times and places of holding courts of oyer and terminer, within their respective districts; and, having made such appointments, a judge has no authority to adjourn such

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court, to be held at another place within such district. (*Northrup* agt. *The People*, 37 N. Y. R. 203.)

2. The court of oyer and terminer, being adjourned to be held in a place within the district other than that fixed upon by the judges of the supreme court, has no authority to transact any business at such place of adjournment, and criminal trials and convictions had at such place will be void, and be set aside as erroneous. (*Id.*)

PARTIES.

1. Tenants in common must join in actions to recover for injuries to the realty, and this rule has not been changed by the Code. (*De Puy* agt. *Strong*, 37 N. Y. R. 372.)
2. When a demurrer can be interposed for a defect of parties, the defendant is confined to that remedy alone; and it is only where evidence is necessary to make the defect apparent that an answer to that point is permitted. (*Id.*)
3. By the terms of an agreement between S. and the plaintiff, the business relating to a joint adventure was to be done in the name of the plaintiff alone, and it was so done, in fact, S. contributing nothing to the adventure in money, services or time. The defendants dealt with the plaintiff in his individual name, and treated him as the only person interested. *Held*, that the plaintiff might maintain an action to recover a balance due from the defendants on account of the adventure, without joining S. as a co-plaintiff. (*Howe* agt. *Savory*, 4 Barb. 403.)
4. *Held*, also, that if S. had in fact an interest in the subject matter of the action, as between himself and the plaintiff, the latter might be regarded as the trustee of S. to that extent, and, as such, entitled to sue in his own name. (*Id.*)
5. *It seems*, that a number of persons may be joined as defendants, in an action to restrain their acts on the ground of nuisance, where their acts are of the same general character and depend upon the same claim of right, notwithstanding the acts of each one are distinct from those of the others, and the complaint contains no charge of combination. (*Masterson* agt. *Short*, 3 Abb. N. S. 154.)
6. A private citizen, appearing in court in the capacity of tax payer only, cannot be heard in opposition to the confirmation of the report of commissioners of estimate and assessment appointed un-

der the act of 1867 (ch. 290), providing for the improvement of a highway in Westchester county. Whatever interest an individual has in the determination of such question arises from his liability, in common with others, to contribute a tax or assessment, and is not sufficient to confer on him a standing in court. (*Matter of the Southern Boulevard*, 3 Abb. N. S. 447.)

7. In an action by one partner against his co-partner, for a dissolution of the partnership, partly upon the ground of his fraudulent sale of partnership property to a third person, it is proper to make the fraudulent vendee a party, as the sale may, in such action, be adjudged fraudulent and void, and the vendee be compelled to account for it, or its value. (*Webb* agt. *Helion*, 3 Robt. 625.)
8. The defendants, being common carriers, certain property placed in their charge for transportation, and put on board their steamship, so that a large quantity of other freight was stowed above it, was claimed by two different parties, having distinct and separate interests, just before the sailing of the ship, and one brought the present action for the recovery of the goods, and the other threatened an action. *Held*, that it was a proper case for the interposition of the court, under section 122 of the Code, to substitute, by an order, the other party claiming the property, as defendant. (*Schuyler* agt. *Hargous*, 3 Robt. 673.)

PARTNERSHIP.

1. To constitute a general partnership, nothing more is necessary than that the parties should agree to conduct a specified business, and to share its profit and loss. The business may be of a general nature, or may be confined to particular transactions; but in either case the partnership is general. (*Eldridge* agt. *Troost*, 3 Abb. N. S. 20.)
2. A general partnership may exist in respect to a single venture, or may be made to extend over any number of adventures agreed upon by the parties. (*Id.*)
3. The general rules which govern the actions of courts of justice in decreeing dissolutions of co-partnership stated. (*Waterbury* agt. *Merchants' Union Express Co.* 3 Abb. N. S. 163.)
4. One purchasing property for others merely as their agent, and depending for the measure of his compensation upon the amount of profits realized by

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his principals from the transaction, is not a partner with them in the property so purchased. (*Lewis agt. Greider*, 49 Barb. 606.)

5. And, although interested in the amount which may be recovered in an action brought by his principals against purchasers, to recover damages for a breach of their contract to buy such property, not being a part owner of the property, he need not be joined as a plaintiff therein. (*Id.*)
6. There is no such survivorship between partners as there is between joint tenants. Hence, upon the dissolution of a firm by the death of one of the partners, the survivor has no power, as such, to assign the whole stock in trade of the firm to creditors by way of preference. (*Per McCUNN, J.*) (*Loeschigt agt. Addison*, 3 Robt. 331.)
7. Where the surviving partner of a dissolved firm conveyed all its stock in trade to his father-in-law, a favored creditor, and then mortgaged all the remaining estate of the firm to the same creditor, as an indemnity not only against any failure of title, but against remotely contingent future expenses which he might incur for counsel or otherwise in defending all actions which might be brought against him to test the validity of the conveyance: *Held*, that such conveyance carried the privilege of giving preferences too far; and that its inevitable effect to delay creditors to an indefinitely remote period brought it within the very letter of the statute. (*Per McCUNN, J.*) (*Id.*)
8. The only ground on which authority over partnership assets can be claimed for a surviving partner, before the payment of the debts of the firm, is that the original legal entity which owned the property having ceased to exist as an entirety, the surviving partner being all that remains of it, is the fittest administrator and distributor of such property. If he assume such duty, he must exercise it as trustee for all parties in interest equally, and not give preferences. (*Per McCUNN, J.*) (*Id.*)
9. After the dissolution of a partnership by the death of one of its members, the choses in action of the firm constitute a trust fund for the payment of its debts; and it seems the stock in trade, and lease of the store in which it is carried on, are equally subject to that trust. The surviving partner, in the performance of such trust, has no power to exercise partiality between creditors, but is bound to distribute the property among them *pro rata*, according to the

maxim that equality is equity. (*Per McCUNN, J.*) (*Id.*)

10. A surviving partner has no right to transfer the whole property of the firm to a trustee to sell the same for the payment of the partnership debts. (*Per McCUNN, J.*) (*Id.*)
11. A joint undertaking between two or more persons, who are to participate in the profits and loss resulting from it, constitutes a partnership. (*Marvin agt. Playford*, 3 Robt. 702.)
12. To make one a partner, he must not only share in the profits, but share in them as principal. (*Id.*)
13. An agreement between two persons, giving one of them one-half of the net profits of the business, but not making him liable for any losses, does not make him a partner. (*Id.*)

PARTY WALLS.

1. A party wall, creating a community of interest between adjoining proprietors, is in no just sense to be deemed a legal incumbrance upon the property. (*Hendricks agt. Stark*, 37 N. Y. R. 106)
2. A party purchasing a hotel and premises at public auction, without being informed that part of the walls of the hotel adjoining other buildings, are party walls cannot, for that cause, refuse to complete the purchase. (*Id.*)
3. As between adjoining proprietors maintaining party walls, their mutual easement in walls is a benefit, and not a burden to each of them. (*Id.*)

PAYMENT.

1. A bank upon which a check is drawn having paid the same, cannot recover back the money from the person to whom it was paid, although the check prove a forgery. (*National Bank of Commonwealth agt. Grocers' National Bank*, ante, 412.)
2. The loss under such circumstances should fall on the bank upon which the check was drawn. A bank should know the signature of its dealers. (*Id.*)
3. The right of a party ultimately to be affected is not concluded by what transpires at the *New York clearing house*, or the entries made there, in respect to a check which passes through it. The clearing house does not pass upon the genuineness of the paper. (*Id.*)
4. Payments involuntarily made may be

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- recovered back, if the payment was in fact improper. (*Id.*)
5. *Parol evidence* is admissible to contradict or explain a receipt of payment given by a party for goods or property sold: Thus, "received payment by note, three months," and "received payment of M. K. & Co.'s note, four months." (*Buswell agt. Pioneer, ante, 417.*)
 6. Such receipts constitute no agreement between the parties that the notes mentioned therein, shall be taken as absolute payment, and therefore, being merely receipts, may be explained by parol evidence, by showing that the notes were not paid, and were valueless. (*Id.*)
 7. Where the only issue formed by the pleadings, is the fact of payment in the manner set up in the answer, the affirmative of such issue is upon the defendant. (*Id.*)
 8. A payment by the debtors of a judgment debtor, in obedience to an order made by a judge, under and in pursuance of section 294 of the Code of Procedure, requiring such payment upon the judgment debt, is a valid payment, although no notice of the proceedings is given to the judgment debtor. (*Gibson agt. Haggerty, 37 N. Y. R. 555.*)
 9. Such a payment is also a valid payment, and a full protection to the debtor against an assignee of the debt, who has not given notice to the debtors that the debt has been assigned to him. (*Id.*)
 10. Supplementary proceedings to compel the debtors to pay the debt upon and toward the satisfaction of a judgment against their creditor, may be taken under section 294, without any proceeding against the creditor (the judgment debtor) under section 292 for his examination. The proceedings authorized by these two sections, respectively, are independent of each other. (*Id.*)
 11. Whether notice shall be given to the judgment debtor of the proceedings under section 294 rests in the discretion of the judge. (*Id.*)
 12. Where, by the terms of a contract, it is provided that payments shall be made previously to the execution of a deed, it is not necessary for the plaintiff to convey, or to offer to convey, before bringing suit, even for the last installment. (*Paine agt. Brown, 37 N. Y. R. 228.*)
 13. Where the time appointed for payment may happen before the time appointed for the conveyance of the property, an action for the money may be maintained without tendering a conveyance, etc. (*Id.*)
 14. The giving of a new note by one of two joint and several makers, intended as a provision for the former note, not agreed to be taken in payment, and not in fact paid, constitutes no defense to an action upon the original note. (*Bates agt. Rosekrans, 37 N. Y. R. 409.*)
 15. The statement in the answer, as "a further defense," that the note in the complaint described arose out of partnership transactions, of which the defendant and one Bigham were members, and was given for the benefit of the partnership, and Bigham afterward transferred all his interest in the partnership property to plaintiff, who was then the holder of the note, and, in consideration thereof, the plaintiff agreed with Bigham to pay his share of the debts of the partnership, and any balance due him from the partnership, and to cancel the note; that Bigham's share of the debts amounted to more than the note; that Bigham owed the partnership a balance greater than the amount of the note; and the plaintiff has received and holds, under the assignment, property of more value than the amount of the note; and that he has not paid any part of the partnership debts, and refuses to apply the partnership property to the payment of the debts; is an answer, and not a technical counter claim. (*Id.*)

PETITION.

1. Whether an application for the laying out of a public highway, is an application for the laying out of one highway or of two highways, is a question of fact, upon which this court is bound by the decision of the court below affirming the judgment. (*The People agt. The Commissioners of Milton, 37 N. Y. R. 360.*)
2. A petition for the laying out of a public highway, may lawfully include a portion of a highway already in existence, and the new highway may, for a portion of its distance, be laid out upon and be identical with an existing highway. It is a question of discretion and convenience to be determined by the commissioners or referees. (*Id.*)
3. A description of a portion of the new highway, by reference to an established highway, is a description by "metes and bounds," and is a compliance with the statute on that subject. (*Id.*)

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PLEDGE.

1. A court of equity has no general jurisdiction over actions to redeem personal property *pawned*, without some other circumstances rendering its interference necessary. (*Durant* agt. *Einstein*, ante, 223.)
2. The remedy at law is ample, by tender of the amount due and a possessory action to recover the articles pledged, or damages for their detention. (*Id.*)
3. The only ground of equitable jurisdiction over an action for the redemption of personal property pledged, besides the necessity of a *discovery*, and perhaps an *assignment of the pledge*, is the necessity of *taking an account*. (*Id.*)
4. It is fully settled that the *account* on which equity bases its jurisdiction must be really one; that is, not having only one item on one side and a number of set-offs on the other, but a series of transactions on both sides. (*Id.*)
5. Where an action is brought to redeem certain securities in the hands of the defendants, as stock brokers, upon paying the amount due thereon, and for an injunction order restraining the defendants from selling such securities until an account can be taken of the amount due the defendants, it cannot be sustained where it appears that the claim on the part of the defendants can only consist of one item—the original advances by them, or so much of it as remains unpaid. (*Id.*)
6. Every sum paid or to be credited in that account forms a subject of set-off in an action at law, even including any liability of the defendants, as alleged in the complaint, for selling any of the original pledged stock below its market price; as such liability forms a subject of counter-claim in an action for the loan, under the first subdivision of section 150 of the Code. (*Id.*)
7. *Unliquidated damages*, for an entirely unauthorized sale of pledged stocks or securities, can form no part of an *account* to give jurisdiction to a court of equity. (*Id.*)
8. Where defendants, holding as collateral security certain stocks which had subsequently been assigned to plaintiffs, sold the same with the assent of the assignees, in an action by the assignees against defendants to recover the surplus proceeds of the stock, the defendants can claim against such surplus only such an amount as, if tendered by plaintiffs at the time of the assignment, with interest and expendi-

tures, would have cancelled and discharged the claims of defendants as pledgees of the stock. (*Van Blarcom* agt. *The Broadway Bank*, 37 N. Y. R. 540.)

9. Where the title to the stocks had passed to the assignees prior to the sale by the defendant, the title to the surplus moneys, at the time of the sale, was vested in the assignees, consequently the defendants could set-off no claim which they at the time held against plaintiffs' assignor. (*Id.*)

POWER.

1. When a power is to be exercised by several persons, a majority of the whole number may proceed to act, and their action will be legal, provided all the members composing the body are summoned to attend, or had notice of the time and place of meeting. (*Matter of the Extension of Church street*, 49 Barb. 455.)

PRINCIPAL AND AGENT.

1. If a general agent has received particular instructions, which he disregards, his acts as agent are nevertheless binding upon his principal. As between the principal and a general agent, any deviation from particular instructions will render the latter accountable to the former, for any loss he may sustain in consequence of such deviation; but, as to third parties, who may have dealt with the agent, any limitation of the authority, not communicated to them, can have no effect. (*Edwards* agt. *Schaffer*, 49 Barb. 291.)
2. P., who purchased of the plaintiff certain goods for the defendants, was employed by the latter to transact their business in that branch of their commercial house situated in the city of New York. They had a manufacturing establishment in Prussia; they transmitted a portion of the goods there manufactured to New York, which were sold there by P., who was in the habit of purchasing goods for them there, to be used in their manufactory in Prussia. P. published notices, and wrote letters in the defendant's name; wrote orders in their name and style; and acted precisely as his principals would have acted had they been here. The firm name of the defendants was on the sign over the door of their place of business, in New York; and when payment for the goods in question was demanded, P. wrote a note, signed in the name of the firm, promising payment at an early

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day: *Held*, that this was sufficient to show that P. was the defendant's general agent, acting as their representative to do everything for them which the necessities of their business here required. And that in the absence of any instrument expressly appointing him to do this, the facts showed an implied authority. (*Id.*)

3. Where principals accept and pay for a portion of the goods purchased for them by their agent, they thereby dispense with any particular instructions, directing that the whole shall be delivered at once. If they design to accept no more than the portion already delivered, they should give early notice of that intent. (*Id.*)

4. The general rule is that sums received from third persons by an agent, in the business of his principal, either as profits or compensation, belong to the principal. But this rule being for the benefit of the principal, he may waive it, and with his consent the agent may retain to his own use moneys thus received. The evidence of such consent, however, should be clear and satisfactory. (*Howe* agt. *Savory*, 49 *Barb.* 403.)

5. An agent is not bound to insure for his principal unless expressly instructed so to do; or unless an understanding to that effect exists between them. (*Lee* agt. *Adsit*, 37 *N. Y. R.* 78.)

6. In all cases where the insurance is taken for the benefit of parties other than the party effecting the insurance, extrinsic evidence may be resorted to for the purpose of ascertaining the interests intended to be covered. (*Id.*)

7. When the evidence clearly discloses the fact that the principal had not instructed his agent to insure the property in his hands, and that there was no understanding between them to that effect, it is competent for the agent to show, by extrinsic evidence, that the property of such principal in his hands was not intended to be covered by an insurance effected upon property held in trust for other consignors. (*Id.*)

8. The principal is under an implied obligation to indemnify an innocent agent for obeying his orders, where the act would have been lawful in respect to both, if the principal really had the authority which he claimed. (*Howe* agt. *Buffalo, N. Y. & Erie Railroad Co.*, 37 *N. Y. R.* 297.)

9. The acceptance by a creditor of the note of the surety in satisfaction of the demand, is equivalent to payment, as

against a party bound to indemnify the surety. (*Id.*)

10. Whenever the very act of the agent is authorized by the terms of the power, so that by comparing the act done by the agent with the language of the power, the act itself is warranted thereby, such act is binding on the principal, as to all persons dealing in good faith with the agent. (*Westfield Bank* agt. *Cornes*, 37 *N. Y. R.* 350.)

11. Notice to a director of a bank, or knowledge derived by him while not engaged officially in the business of the bank, cannot operate to the prejudice of the bank. (*Id.*)

12. Where a party legally obligated to cancel and discharge a mortgage upon the premises of defendant, falsely assumes to act as the agent of the defendant in borrowing money to cancel such mortgage, and succeeds in borrowing the money and canceling the mortgage, but without the knowledge, privity or consent of the defendant; the defendant is not responsible to the party lending the money, even though he have the benefit of the discharge of the mortgage in consequence thereof. (*Henry* agt. *Wilkes*, 37 *N. Y. R.* 562.)

13. The fact that the money with which to discharge a mortgage is obtained by fraudulent representation by the party whose duty it is to discharge the same, creates no trust in favor of the party loaning the money. (*Id.*)

PRINCIPAL AND SURETY.

1. To exempt a surety from liability by reason of the neglect and refusal of the creditor to collect the debt of the principal debtor while he was solvent, although requested to do so, by the surety, it must be shown that the creditor was requested to enforce the collection of the debt by due process of law. Nothing short of that, in such a case, will exonerate the surety. (*Singer* agt. *Troutman*, 49 *Barb.* 182.)

2. Where the request was, that the creditor should "push" the principal debtor, "and keep pushing him": *Held*, that the words used had not the same legal significance as to the words "prosecute and collect;" that to give those terms the same legal significance, it was necessary not only that the creditor should have understood them in that sense, but that the surety should have meant and intended that also. (*Id.*)

3. The terms in which such a request are

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made, are not material, but they should be unequivocal, and clearly and plainly intended and understood as a request to collect by prosecution. (*Id.*)

PRIVILEGED COMMUNICATIONS.

1. Where defendant kept a merchandize agency, whose business it was to obtain information respecting the credit and responsibility of persons in business, and to furnish the same to those who had just occasion to use it, his communication, made in good faith to a subscriber in respect to the character and standing of the plaintiff, is to be deemed confidential. (*Ormsby agt. Douglass, 37 N. Y. R. 477.*)
2. Where communications are regarded as privileged, they are protected from the presumption of malice which is usually to be inferred from the charge itself. (*Id.*)
3. When, in an action of slander, it is made to appear that the defendant had just occasion for speaking the words deemed slanderous, then malice is not to be presumed, and additional evidence is necessary to establish the charge. (*Id.*)
4. In case of privileged communications, the presumption of malice being rebutted, the plaintiff must show that the defendant was influenced by other motives than the mere discharge of a duty. (*Id.*)
5. Where the occasion of speaking the words is one which makes the communication *prima facie* privileged, evidence that it was false is not sufficient to raise the presumption of malice. (*Id.*)

PRODUCTION OF LETTERS.

1. A simple sworn statement, by a party to an action, that certain letters written by her to a third person, which have come to the hands of the counsel for the opposite party, are, as such applicant is advised, material and necessary for her defense, is not sufficient to authorize the granting of an order to produce such letters, or deliver sworn copies of the same. The advice of counsel, or belief of a party, cannot be substituted for the judgment of the court upon the facts and circumstances showing the necessity for such production. (*Strong agt. Strong, 3 Robt. N. S. 375.*)
2. Where there is no sufficient information before the court, of the contents of writings, to enable it to judge whether

they would be beneficial or prejudicial to either party as evidence, it ought not to compel their production. A mere fishing application should be denied. (*Id.*)

3. Although all the parts of a continued and connected correspondence, having relation to a particular subject, become evidence when one is introduced, upon the presumption that as they all belong to a series, they have some connection with each other, no such presumption can arise in regard to ordinary friendly letters between intimate connections. It will not be presumed that all of such letters must necessarily relate to the same subject. (*Id.*)
4. Production of letters written by a party will not be ordered, where the want of possession of copies, or recollection of their contents, is not sworn to by the author of them, but by a third party, alone, and not even on information and belief; and no information is given how the person verifying it learned that the letters were intended to be used on the trial, or what person has the intention so to use them. (*Id.*)

PROPERTY.

1. Property provided by county superintendent for the support of the poor, if stolen, may be laid in the indictment as the property of the county or of the superintendent. (*The People agt. Bennett, 37 N. Y. R. 117.*)

PURCHASER IN GOOD FAITH.

1. When a surety for a firm takes an assignment of the co-partnership property, and assumes its liabilities, he comes within the rule, that the assumption of a new liability is a sufficient consideration to constitute the party a purchaser in good faith. (*Williams agt. Shelly, 37 N. Y. R. 375.*)
2. By such an assumption, the party becomes principal debtor instead of surety. (*Id.*)
3. When a party purchases personal property of a judgment debtor, after an execution has been issued and put into the hands of the sheriff against such property, it would seem that the onus is on the vendee to show himself to be a purchaser in good faith. (*Id.*)

RAILROADS.

1. A railroad passenger has a right to a seat in the cars, and it is the duty of

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- the railroad company to provide him with one. (*McIntyre* agt. *N. Y. Cen. R. R. Co. ante*, 36.)
2. If, in discharging that duty, the company require the passenger to perform an act which is perilous in itself, in passing from one car to another, in a dark night, when the cars are in motion, and in doing which the passenger loses his life, the negligence, if any, which that act involves, should be imputed to the company alone. (*Id.*)
 3. Thus, where the railroad company, on arriving at a station, in the evening, detached and left the rear car, notifying the passengers therein to go into the next car forward, and after a stoppage of some ten or twelve minutes the cars moved on, when one of the employees of the road, discovering a number of passengers standing in the rear car, said, "go forward; there are plenty of seats forward; go forward, if you want seats;" some of the passengers then went forward, among them the plaintiff's intestate, a lady, who undertook to carry a *bandbox*, *bundle*, *basket* and *flower pot*, and in stepping from one car to another, fell between them and was killed:
 4. Held, that the rule that *contributory negligence* will prevent a recovery by the party suffering the injury, ought not to be applied to such a case. (*Id.*)
 5. In appraising lands to be taken for a railroad, under the statute, the commissioners are not authorized to increase the amount of compensation which they have fixed as the full value of the land, by allowing *consequential damages*, based upon the possibility, or even probability, that the particular business in which the owner was engaged might be injured, and his property (a flax mill) decrease in value, in consequence of danger to be apprehended from fire emitted from the engines used by the company in running their road. (*Matter of Union Village, &c. R. R. Co. ante*, 420.)
 6. When the Sixth Avenue Railroad Company of the city of New York, the defendants, secured its charter, it was with the tacit understanding they could charge *five cents fare in specie*, that being then the lawful money. (*Money* penny agt. *Sixth Ave. R. R. Co. ante*, 452.)
 7. An extraordinary crisis arose, compelling the general government to issue a paper currency, which enhanced the value of the original fare, and justified the defendants in advancing their fare one cent, when paid in paper. (*Id.*)
 8. The law of congress, passed 1864 (*Statutes at Large, Thirty-eighth Congress, p. 485*), justified the city railroad companies in adding the additional cent to the fares, even if the paper currency had not depreciated the original fare; and passengers are bound, if they wish to ride by these cars, to pay such additional cent. (*Id.*)
 9. The penal act of 1857, against railroad companies, does not apply to city railroad companies, and by operation of law the penalty sought for against these defendants cannot be recovered. (*Id.*)
 10. A contract by the owners of a railroad, to be made under an act of incorporation, with the owners of a rival railroad, not to continue such road beyond a certain point, is void as contravening public policy. (*Hartford and New Haven R. R. Co. agt. The New York and New Haven R. R. Co. 3 Robt. 411.*)
 11. Such a contract does not affect a prior agreement between the owners of such road, who also owned another railroad, and the owners of another road adjoining the latter, to divide the through fares of passengers on such continuous road in a certain proportion, although the former contains a provision to deduct an additional sum monthly from such through fares as a consideration for entering into such new illegal contract; and such through fares must be divided as though such second and illegal contract had never been made. (*Id.*)
 12. The division of the through fares of passengers upon a connected line of railroad consisting of two adjoining railroads, owned by two different owners, between such owners, according to certain rules and in a certain manner, for six years, without objection, operates as a construction or modification of any previous contract, if not a new contract between such owners, and is binding upon them, and must be presumed to continue until formally annulled or rescinded. (*Id.*)
 13. An agent of a railroad corporation, having charge of a depot and the freight therein, is the proper person to inquire of respecting lost baggage, and his answer is part of the evidence of the loss, and admissible, as *res gestæ*. (*Curtis agt. The Avon, Genesee, &c. R. R. Co. 49 Barb. 148.*)
 14. So in regard to an arrangement between a passenger and the baggage master, at a station, that the baggage of the former may remain at the depot, and that the latter will see to it until it can be sent for. (*Id.*)

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15. In an action by a passenger against a railroad company, to recover for lost baggage, evidence to show that the passenger was lame, and unable to take charge of his baggage personally, is admissible, as tending to prove that he was guilty of no negligence in not calling for and taking charge of his baggage upon the arrival at his place of destination, and as furnishing a good reason for making an arrangement with the agents of the railroad company that it should remain in the custody of the company until called for. (*Id.*)
16. Where a passenger, on arriving at his destination, neglects to look after his baggage, and negligently leaves it, without any arrangement that the carrier shall retain it for him, and it is lost while thus situated, without fault on the part of the carrier, the latter is not liable. (*Id.*)
17. But where there is no delivery of baggage carried upon a railroad to the passenger, and no neglect to claim it or inquire for it, but, on the contrary, the company's agents agree to retain it until it can be sent for, the company's liability as a common carrier continues after the baggage is taken from the cars, and until it is delivered or tendered to the owner. (*Id.*)
18. Where a railroad bridge was well built, of good sound materials, upon a plan in common use, and the evidence as to its strength and capacity was abundant, and its sinking was in no sense due to any defect in its original construction, but to a process of natural decay, called dry rot; and the day before it fell it had been inspected by the repairer of bridges and the division superintendent, competent men, and examined, tested and watched under the weight of a train of cars, and was deemed by them entirely sound and safe: *Held*, that the company was not liable to the representatives of an employee who was killed by the falling of the bridge, either on the ground of a defect in its construction constituting negligence, or want of ordinary care, or by reason of the employment of incompetent, unskillful or improper persons to examine the bridge. (*Faulkner* agt. *The Erie Railway Company*, 49 *Barb.* 324.)
19. *Held, also*, that to render the company liable, on the latter ground, it must affirmatively be made to appear that proper care was not used in the selection of its agents, and that by the exercise of proper care those agents would have been rejected as incompetent. The company is not a guarantor of competency or fitness in its employees. (*Id.*)
20. *Held, further*, that the company was not responsible for the insufficiency of the bridge, in the absence of notice, unless the company was ignorant of its condition through its negligence or want of proper care. (*Id.*)
21. Under the act of congress, approved February 25, 1862, authorizing the issue of United States notes, and declaring that they shall "be lawful money and a legal tender for all debts, public and private, within the United States, except duties on imports, and interest," &c., a railroad company is bound to accept United States notes issued in pursuance of that act, at the value expressed on the face of them, in payment of fare upon its railroad, when demanded in advance of transportation on such road. (*Lewis* agt. *The New York Central R. R. Co.* 49 *Barb.* 330.)
22. If it exacts payment of the legal fare of a passenger in advance, in gold or silver coin of the United States, or the market value of such coin in United States notes, it will be guilty of extortion, and liable to the penalty imposed by the act of the legislature of March 27, 1857, for asking and receiving a greater rate of fare than that allowed by law. (*Id.*)
23. Railroad companies, as common carriers of passengers, must be held to guaranty the soundness and safety of their vehicles, their bridges, roadway and machinery. (*Warner* agt. *The Erie Railway Company*, 49 *Barb.* 558.)
24. But this rule does not apply in the case of servants of a railroad company; there being no such guaranty as between master and servant. (*Id.*)
25. The remedy of a servant, against a master, for injuries sustained in the service of the latter, rests entirely upon the ground of misfeasance or negligence. (*Id.*)
26. For injuries sustained by a servant, in his master's employment, an action lies in three cases: 1st. Where the injury was caused directly by the personal fault, negligence or misfeasance of the master. 2d. Where the injury resulted from the careless hiring or retaining of incompetent or unskillful servants in superior positions. 3d. Where the master does not take proper precautions for the safety of his servants, but subjects them to injury by the use of unsafe machinery, or exposes them to unreasonable risks and dangers. (*Id.*)

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27. In an action by the personal representative of a person who was killed while in the employ of the defendants, upon their railway, as a baggage master on a train of cars, by the breaking down of a bridge, to recover a compensation for the injury, when the plaintiff rested, on the trial, she had proved that the bridge fell from decay; that one of the cords was badly rotted, and a great many pieces of the bridge were decayed, more or less; that four or five posts were rotted at the tenons clear through; that the bridge had been built more than ten years, of timber but partially seasoned, and then painted, thus causing dry rot, and by the testimony of several experienced bridge builders, that such a bridge could not reasonably be expected to stand over from five to eight years. *Held*, that upon this undisputed testimony the judge properly refused to order a nonsuit, and that he would not have been warranted in taking the case from the jury. (*Id.*)
28. Although the law does not require that the directors of a railroad corporation, as individuals, should possess particular professional knowledge or skill in bridge building, or in the construction or repairs, or in the more knowledge or skill than may yet it does require that representing the corporation with ordinary care and diligence for the construction, maintenance of the road, and of the employees of it that they be not subject to any and unreasonable (*Id.*)
29. To charge a railroad company with negligence, it is not necessary to show that the directors knew or had notice of defects in their machinery, or in the construction of the railroad, or in its bridges or otherwise. It is their duty, acting for the corporation, to anticipate decay and failure in their works and structure and machinery, and to provide against such decay and failure in season to prevent injury or damage; and a clear omission to do so on their part is negligence, and negligence of the corporation. (*Id.*)
30. The appointment of competent and skillful agents is simply the discharge of a single duty, and will save the corporation from liability for negligence on that ground. But if skillful and competent agents neglect their duty, to the injury of the servants of the corporation, or others, the corporation is not absolved. Such neglect is still the neglect of the corporation. (*Id.*)
31. The exemption of a principal from liability to a servant for an injury inflicted by the negligence or want of care of a fellow servant, extends to all cases where the servants are strictly fellow servants in the same department of service, and are not subject to the order or control of each other. (*Id.*)
32. All subordinates, who are under the control of a superior, are entitled to hold such superior as representing the master, and the master as responsible for his incompetency or misconduct. (*Id.*)
33. Thus, where a railroad corporation, through its board of directors and its other agents, acting under their authority, is guilty of negligence in not taking the proper care and precaution to see to it and know that a bridge is safe and secure, and a baggage master in its employ is killed by the breaking down of such bridge in consequence of decay, the corporation is liable in an action for damages brought by the personal representative of the deceased. (*Id.*)
34. Where, in an action against a railroad company to recover damages for a personal injury, there was no pretence that there was any negligence on the part of the defendants which could sustain the action, except in the omission of the engineer or person in charge of the defendants' locomotive to ring the bell, or sound the whistle, at a street crossing; and the testimony of the engineer upon that point was positive and unqualified that the whistle was blown and the bell rung, and another witness testified that he heard the bell ringing and saw the engine pass; and this testimony was clear, positive and circumstantial, and uncontradicted, except by the testimony of the plaintiff and another person near by at the time, who swore that they heard no bell or whistle: *Held*, that a verdict in favor of the plaintiff was not warranted by the evidence; and a new trial was granted. (*Subert v. The Erie Railway Co.* 49 Barb. 503.)

RECEIPTS.

1. *Parol evidence is admissible to contradict or explain a receipt of payment given by a party for goods or property sold: Thus, "Received payment by note, three months," and "Received payment of M. K. & Co.'s note, four months." (Bussell v. Poirer, ante, 447; N. C. & N. Y. R. 312.)*

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2. Such receipts constitute no agreement between the parties that the notes mentioned therein shall be taken as absolute payment, and therefore, being merely receipts, may be explained by parol evidence, by showing that the notes were not paid, and were valueless. (*Id.*)
3. Where the only issue formed by the pleadings is the fact of payment in the manner set up in the answer, the affirmative of such issue is upon the defendant. (*Id.*)

RECEIVER.

1. A receiver may be appointed to wind up the affairs of an insolvent bank, either under the Revised Statutes or under the act of 1849. (*People agt. Central City Bank, ante, 428.*)
2. It is a general rule of courts of equity that, when anything is due to a mortgagee in possession, he will not be deprived of such possession by any appointment of a receiver. (*Bolles agt. Duff, ante, 481.*)
3. And particularly is this so when the mortgagee is responsible and is able to account for and pay any excess of rents and profits, after the payment of his debt, or will give security to do so. (*Id.*)
4. But where it appears that the mortgagee is irresponsible, or that the rents and profits would be lost or would be in danger of loss, or that the mortgagee was committing waste upon or materially injuring the premises, a different rule would prevail, and a receiver would be appointed. (*Id.*)
5. Where an interlocutory decree of a judge involves an adjudication that the mortgagee in possession, who is also appointed receiver, is entitled to remain in possession as such mortgagee until the coming in of a referee's report; although such adjudication would not prevent the court from removing him from his office of receiver, for proper cause shown, at any time before the coming in of such report, yet, if not as a matter *res adjudicata*, as matter of judicial decorum, it precludes his removal by any other judge of the court, for any cause existing before such interlocutory order, than the judge by whom such order was made. (*Id.*)
6. The defendant, in an action brought by a receiver as such, put in a demurrer, which, on motion, was stricken out as frivolous; and she, on applying to the court for leave to answer, was allowed to do so, provided that she executed a bond, with sureties, conditioned that if the plaintiff should finally recover judgment against her she would obey such judgment, and would pay the plaintiff the sum thereby directed to be paid. Such bond was thereupon executed. In an action thereon, it was held, that the execution of such bond to the plaintiff as receiver must be deemed an admission by the obligors, not only that the plaintiff had been duly appointed receiver, but also that the receiver was authorized to bring the action mentioned in the condition of the bond. (*Scott agt. Duncombe, 49 Barb. 73.*)
7. Held, also, that it was not necessary for the plaintiff, on the trial, to show the judgment recovered, and execution issued and returned unsatisfied, especially as the defendant had not set up in his answer that the plaintiff had not been regularly appointed receiver, and made no attempt to show that he had been, on the trial. (*Id.*)
8. Held, further, that it was not necessary for the plaintiff to introduce even the original order appointing him receiver, or his bond as receiver. (*Id.*)
9. The surety in a bond given to a plaintiff suing as receiver, conditioned to pay any judgment the plaintiff may recover against the principal obligor, in that action, is liable for the amount of judgments recovered in cases wherein the obligee is appointed receiver subsequent to the execution of such bond, as well as for the amount of those recovered previously. (*Id.*)
10. An appeal will lie to this court from an order of the general term refusing to vacate an attachment, where such vacation is asked for as a matter of law and of strict right, and not involving any question of discretion. (*Tracy agt. The First National Bank of Selma, 37 N. Y. R. 523.*)
11. A receiver of an insolvent corporation cannot interfere in a case, as by giving notice of a motion, or conducting an appeal in his own name, until he has been made a party to the action by an order of the court. (*Id.*)
12. Where a receiver of an insurance company prosecutes an action for the recovery of money for the enhancement of the fund of which he is receiver, and fails to recover, the defendant is entitled to costs. (*Columbian Insurance Co. agt. Stevens, 37 N. Y. R. 536.*)
13. Such defendant is not bound to await the administration of the fund, and, as a general creditor, to show with other

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parties interested therein *pro rata*, but is entitled to an immediate order for the payment of the costs out of any funds in the hands of the receiver. (*Id.*)

14. When such receiver continues the prosecution of an action begun by the company before his appointment, he is chargeable with the costs in like manner as if he were made a party plaintiff. (*Id.*)

REFEREE.

1. Where there is a conflict of evidence, the court will not disturb a referee's conclusions of fact. (*The Hartford and New Haven R. R. Co. agt. The New York and New Haven R. R. Co.* 3 Robt. 411.)
2. A referee is not required to find upon any other facts than those which enter into and form the basis of the judgment to be entered upon his report. He is not required to negative in express terms any other facts. Facts not found are necessarily negated by implication. (*Sermont agt. Baetjer*, 49 Barb. 362.)
3. Where, in an action upon a charter-party, the answer set up as a defense that the plaintiff induced the defendants to enter into the agreement by representing that the vessel would carry at least 480 tons of such cargo as the defendants desired to ship, which representation was false and fraudulent; and the referee found that the parties executed the charter-party set out in the complaint, and that no false or fraudulent representations were made by the plaintiff or his agent, to the defendants, or either of them, with respect to the vessel chartered, for the purpose of inducing them to enter into said agreement, or for any purpose; *Held*, that the finding was sufficient. (*Id.*)
4. A finding that the parties executed the charter-party set out in the complaint, and that the plaintiff fully performed all the conditions of his agreement, is sufficiently explicit in respect to the plaintiff's performance. It is not necessary to find in what manner he performed, or what particular acts he did by way of performance. (*Id.*)

REFERENCE.

1. *Reference of Claims against Executors and Administrators.*—On the 11th of May, 1866, the surrogate of Herkimer county made an order or writing in this case as follows:

2. "SURROGATE'S COURT, Herkimer Co. In the matter of the claim of *James H. Bucklin* agt. *The Estate of Edmund G. Chapin*. The claim of James H. Bucklin having been presented to the administratrix and rejected, and the parties agreeing to a reference: It is ordered by the surrogate, that Hon. Amos H. Prescott, Martin W. Priest, Esq., and William T. Wheeler, Esq., and they are hereby appointed, referees to hear and determine the claim of said Bucklin; and let this order be entered with the clerk of Herkimer county.

"Dated 11th May, 1866, at Herkimer.

"VOLNEY OWEN, *Surrogate*.

"We assent to the above order, and consent the same to be entered May 11th, 1866.

"HARDIN & BURROWS,

"Attorneys for plaintiff.

"H. LINK,

"Attorney for administratrix.

"Indorsed, Filed 11 May, 1866.

"Z. GREENE, *Clerk*."

3. *Held*, 1st. That this order and consent taken together are an agreement in writing to refer required by the statute. (*Bucklin agt. Chapin*, ante, 155.)
4. 2d. That they constituted an approval by the surrogate of the persons agreed on as referees. (*Id.*)
5. 3d. That they were filed, and the fact of filing is noted on the paper, which answers the requirement that the agreement and approval must be filed. (*Id.*)
6. 4th. That the requirement of the statute, that the rule referring the claim to the persons indicated must be entered by the clerk of the supreme court, can be complied with by an entry by the clerk *nunc pro tunc*, if it was not actually entered at the time of filing. (*Id.*)
7. Assuming, however, that the papers are not in conformity to the statute, the referees nevertheless acquired jurisdiction to hear, try and determine the matters in controversy between the parties, by the voluntary appearance of the parties, the supreme court having jurisdiction over such claims, which were submitted to the referees; and their report is legal and binding until set aside by the court in some proceeding properly instituted for that purpose. (*Id.*)
8. There is no more necessity for an agreement in writing and rule of reference in the class of cases under the statute, like the present, than there is in references under the Code (§ 270); and under the latter it is well settled that proceedings upon a reference is a waiver of all objections because of irregularities. (*Id.*)

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9. The appearance before the referees, the trial of the claim presented and report thereon, are all that are necessary to justify the entry of a judgment. All the preliminary steps may be supplied *nunc pro tunc*. (*Id.*)
10. On the trial of a cause, the court has no power, and consequently a referee has none, to allow the amendment of a pleading by inserting a new cause of action or a new defense. (*Ford* agt. *Ford*, ante, 321.)
11. If, on the trial, such an amendment is desired, it can only be obtained by suspending the trial or hearing, and applying on motion to the special term. (*Id.*)
12. The opinions advanced in *Woodruff* agt. *Dickie* (31 *How. Pr. R.* 164), "that a referee is no longer an officer of the court," or that "the court at special term has no more power to grant amendments than the court has on the trial," or "that a referee has all the powers of a court at special term to allow amendments," not concurred in. (*Id.*)
13. A referee appointed to hear and determine a cause is always under the control and direction of the court, and may be removed at its pleasure. (*Id.*)
14. Where the referee, on the hearing, makes an order allowing the amendment of an answer by inserting therein the defense of the statute of limitations, it is an order made without authority; and although it is the subject of exception, and may be reviewed on appeal from any judgment which might be entered on the referee's report, the plaintiff is not restricted to that mode of redress; he may take the more expeditious and less expensive mode, by moving at special term to set aside the order. (*Id.*)
15. The special term possesses the power to set aside any order made by a referee in the progress of a cause, which he had not authority to make; and also the power to compel him to proceed to the trial of the issues referred to him for determination. (*The case of Union Bank* agt. *Mott*, 18 *How. Pr. R.* 516, approved and followed.) (*Id.*)
16. An action to recover the value of property lost to the plaintiff by the negligence of the defendants is not upon a contract, but upon a breach of duty, as a tort, and is not referable. (*Warner* agt. *The Western Transportation Company*, 3 *Robt.* 705.)
17. In an action to open stated accounts, and for an accounting, it is premature to apply for a reference until the question of the right to an accounting has been determined. Until then, it does not appear that any examination of the accounts will be required. (*Mitchell* agt. *Stewart*, 3 *Abb. N. S.* 250.)
18. Where the parties to an action pending before a referee stipulate that he may take more time for making and filing his report than the sixty days prescribed by the statute, his report will not be set aside as made too late, because he exceeds the time mentioned in the stipulation. (*Thiesse* agt. *Rossett*, 3 *Abb. N. S.* 54.)
19. When the parties have once waived, as by the provisions of the statute they are enabled to do, the right to exact a report within the sixty days, there is nothing in the statute which declares that the report may be set aside, or that any other particular consequence shall result from the failure of the referee to report within the extended time. If the parties surrender the right to require a report within sixty days, they cannot, by any stipulation, control the action of the referee. (*Id.*)
20. What constitutes an act indicating the intention of a party to disaffirm the right of a referee to deliver a report after the expiration of the time prescribed by law, considered. (*Id.*)

REDEMPTION.

1. Where defendants, holding as collateral security certain stocks which had subsequently been assigned to plaintiffs, sold the same with the assent of the assignees in an action by the assignees against defendants to recover the surplus proceeds of the stock, the defendants can claim against such surplus only such an amount as if tendered by plaintiffs at the time of the assignment, with interest and expenditures, would have canceled and discharged the claim of defendants pledgees of the stock. (*Van Blarcom* agt. *The Broadway Bank*, 37 *N. Y. R.* 540.)
2. Where the title to the stocks had passed to the assignees prior to the sale by the defendant, the title to the surplus moneys, at the time of the sale, was vested in the assignees consequently, the defendants could set off no claim which they at that time held against plaintiffs' assignor. (*Id.*)
3. Where the commissioners of the land-office order a re-sale of lands, and direct in what paper the notice of re-sale shall be published, it will be sufficient, if it appear that the notice is published

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in the paper intended by the order. (*Candee* agt. *Hayward*, 37 N. Y. R. 653.)

4. An original purchaser has three months after sale, during which he may acquire title to the lands by redeeming them from the purchaser within that time, when the same is purchased by any other than the state; and when bid in for the state, by paying to the state within that time the amount for which it was purchased. (*Id.*)
5. After the expiration of three months from the sale, this preference ceases; and the state engineer can sell to any one who may wish to purchase; and the right of redemption ceases. (*Id.*)
6. Where the common law gives a remedy, and another is provided by statute, the latter is cumulative, unless made exclusive by the statute. Ejectment can be maintained by the commissioners to remove one holding over after notice to quit given by them. (*Id.*)

RELEASE.

1. The sole ground of the effect of a release to one of several joint contractors or wrongdoers, in discharging all is, that it is in presumption of law a satisfaction. Whenever the instrument creating the release is in such a form, or accompanied by such restrictions, as to repel such presumption, it does not necessarily discharge all the parties. (*Mathews* agt. *The Chicopee Manufacturing Co.*, 3 Robt. 711.)
2. When a release in form to a joint debt or or wrongdoer is accompanied by the reservation of the liability of his associate in the contract or tort, it is as plainly the intention of the releasor not to abandon his claim against the latter as it is to relinquish the right of proceeding against the releasee, if he can do so without prejudice to his claim against both. (*Id.*)
3. Both purposes can only be accomplished by restricting the right of proceeding against the releasee to actions *directly* against him, because that will still leave the right of proceeding against the other party. And this can only be done by construing the words of present release as executory and a covenant against actions; leaving the releasee to his right of action for damages thereon, in case he is prejudiced by a subsequent suit brought against him and his associates. (*Id.*)
4. The plaintiff executed a release to the members of a firm who, it was alleged,

were joint tortfeasors with the defendant, if any tort was committed by him, containing the following reservation: "It being expressly understood and agreed that I do not hereby release or prejudice any claim, suit or demand, which I may have against any other person or persons or corporation, for any matter or thing arising out of, or connected with," &c., "or for any other matter or thing whatsoever": *Held*, that the release did not have the effect to discharge the defendant, or to prejudice the plaintiff's claim against him for matters arising out of, or connected with, the transaction referred to. (*Id.*)

5. A release, given after issue is joined in an action, can only properly be the subject of a supplemental answer, and not of an amendment of that originally put in. (*Id.*)

RELIGIOUS SOCIETIES.

1. A religious corporation has, at common law, an inherent right to part with and transfer its property; and statutes which require the consent of a court to such transfer in certain cases, are restrictive upon such common law right, and not the source of it. (*The Madison Avenue Baptist Church* agt. *The Baptist Church in Oliver street*, 3 Robt. 570.)
2. A particular statute which does that (2 R. L. 212, § 11), does not *take away*, entirely, the power of alienation. It merely limits its exercise, by requiring the consent of the court thereto; and so far only, it restrains its power of alienation. (*Id.*)
3. As a religious corporation thus does not derive its power to sell from the statute, and any sale by it is made good upon merely obtaining the sanction of the court to it, a substantial compliance with the spirit and purpose of the statute should be all that is required, and be deemed sufficient. (*Id.*)
4. When the object of a sale is proper, and in no way conflicts with the policy or design of such a statute, no court would be justified in withholding its consent merely because the corporation had formally applied for permission to convey. An agreement to sell always implies an agreement to convey as a necessary means of carrying the sale into effect; and an agreement to convey implies a sale previously agreed upon, which needs only a conveyance to consummate it. (*Per* MONELL, J.) (*Id.*)

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5. Whenever a religious society has resolved to dispose of its property, and determined upon the terms and conditions of sale, and the application to be made of the money arising therefrom, it is in a condition to seek to seek the sanction of the court; and such sanction, when given, may extend to the entire agreement. (*Id.*)
6. An application for such sanction is properly made by the trustees of the corporation, when it is shown that a majority of the corporation have approved of it. (*Id.*)
7. It is no objection to an order allowing a sale made upon such an application, that it does not direct the application of the moneys arising from the sale. The court having acquired jurisdiction, by a proper application, any mere irregularity or defect in the proceedings subsequent to the petition is amendable. Moreover, the application of the proceeds may be directed by a separate order. (*Id.*)
8. Two religious societies may be united, by the abandonment by one of them of its distinctive name and organization, and its merger in the other; and a conveyance of the property of the first to the new society may, under the statute, be sanctioned by the court. (*Id.*)

REMOVAL OF CAUSES.

1. One who maintains his domicile in another state, where his family reside, should be regarded as a citizen of that state, for the purpose of determining a question of removing a cause from a state to a federal court, notwithstanding he carries on business in the state in the courts of which the action is brought, and visits that state regularly and frequently in the transaction of such business. (*Fish agt. Chicago, &c. R. R. Co., 3 Abb. N. S. 453.*)
2. This principle applied to special facts in several instances. (*Id.*)
3. What inference, as to the fact of citizenship, should be drawn from such acts as voting, procuring one's name to be registered as a voter, paying an income tax, &c.—considered. (*Id.*)
4. The New York statutes (*Laws of 1853, ch. 466, and Laws of 1855, ch. 279*),—requiring corporations chartered by other states, and carrying on business in New York, to appoint an agent in New York to receive service of process against such corporations,—do not affect the question of citizenship of the corporation, arising on a motion to re-

move an action in which it is a party from a state to a federal court; nor qualify the rights of parties in such an action in respect to such removal. Those acts provide a mode in which suits may be commenced in the state courts, against the corporations to which they relate; but do not prevent a corporation against which an action has been commenced from applying to have it removed to a federal court. For the purposes of an application to remove a cause from a state to a federal court, a corporation must be regarded as dwelling in the state by which it is created, notwithstanding any business it may carry on in another state; and an action by or against it must be regarded as prosecuted by or against citizens of such state. (*Id.*)

5. The provisions of the act of congress of Sept. 21, 1789,—relative to the removal of causes from state to federal courts,—do not authorize a removal of an action brought against more than one defendant, if any defendant is a citizen of the state in which the action is brought. (*Id.*)
6. In applying acts of congress authorizing removal of a cause in which the "plaintiff" or "defendant" is a citizen, to a cause in which several persons are plaintiffs or defendants, it is requisite that all the plaintiffs or defendants should be citizens. (*Id.*)
7. The construction of the acts of congress of July 27, 1866 (*14 Stat. at L. 306*), and March 2, 1867 (*Id. 558*),—relative to the removal of causes from state to federal courts, and their application to the facts of a particular case,—determined. (*Id.*)

REPLY.

1. A reply which denies averments in the answer, which are material to the pleading a proper counter-claim, cannot be stricken out as frivolous. (*Wood agt. Mayor, &c. of New York, 3 Abb. N. S. 467.*)

REVENUE STAMPS.

1. The latter clause of the provision of the internal revenue act of the United States, authorizing the collector to allow stamps to be affixed to mortgages, when they have been omitted without intent to evade the provisions of that act, or to defraud the government, but declaring that "no right acquired in good faith before the stamping of such instrument * * * and the recording

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thereof, if such record be required by law, shall in any manner be affected by such stamping," &c., does not apply to *chattel mortgages*, inasmuch as it contemplates mortgages which require to be recorded. (*Vail* agt. *Knapp*, 49 *Barb.* 299.)

2. Chattel mortgages are merely filed, and an entry made in a book kept by the clerk of the names of the parties, the amount secured, the date, time of filing, and when due. This cannot be regarded, in any proper sense, as recording a mortgage. (*Id.*)
3. The statute is highly penal, and should not, even in a doubtful case, receive a construction which would invalidate the security. (*Id.*)
4. Under the provision of schedule "B" of the revenue act, specifying among the instruments which require to be stamped "mortgage of lands, estate or property, real or *personal*, heritable or movable, whatsoever, where the same shall be made as a security for the payment of any definite and certain sum of money lent at the time, or previously due and owing, or forborne to be paid, being payable," no stamp is necessary upon mortgages executed to secure the mortgagees as drawers and indorsers of drafts drawn for the benefit of the mortgagors, and payable subsequent to the execution of such mortgages, where no money was lent at the time, nor had any become due and owing, nor was any forborne to be paid, being payable. (*Id.*)
5. A party has no vested right in the penalties inflicted by the revenue laws for the omission of another to place the proper revenue stamp upon an instrument, which cannot be taken away by an amendment of the act imposing such penalties. (*Hoppock* agt. *Stone*, 49 *Barb.* 524.)
6. The use of an instrument in evidence, when not properly stamped, is forbidden by the government as an act of policy, for the more safe and speedy collection of the duty, and not for the purpose of benefitting the one party or the other to the obligation. The power to alter or regulate this policy belongs to the government. (*Id.*)
7. The right of a party claiming property as assignee thereof in trust for the benefit of creditors, to set up the invalidity of a prior mortgage upon such property, by reason of its lacking the proper revenue stamp, may be taken away by a subsequent amendment of the act of congress imposing the penalties for omitting the appropriate stamps, not-

withstanding the mortgage was executed before the amendment went into operation. (*Id.*)

SALE.

1. Although a *public judicial sale* of valuable city lots is not void because it takes place on an *election day* of a city charter election, yet, where it appears that, in addition to the fact that the sale was made on a day most unfavorable to a large gathering, and after a written notice to the referee from the defendant, the person to be most affected by it, that he would consider it "unjust and oppressive;" that the lots were sold in an order contrary to the defendant's directions and wishes, and apparently detrimental to his interests, and under circumstances which gave rise to apprehensions that free competition was interfered with, the sale will be set aside and a re-sale ordered. (*King* agt. *Platt*, ante, 23.)
2. Where an article sold by an auctioneer was called by him "*blue vitriol*," which was open to inspection, but evidently was so termed as being its commercial designation, or as being a vitriol of a blue color (which it was), in either case there was no *warranty* of anything, even though the auctioneer stated that the article "was sound and in good order," and the article in fact was an *inferior article of blue vitriol*. (*Hawkins* agt. *Pemberton*, ante, 376.)
3. The term "sound" applies to *condition* only, not to quality or kind, and is opposed to *defective, decaying or injured*. The article sold was evidently sound as *inferior blue vitriol*, and there being no question but what it was in *good order*, there was no deception practiced upon the purchaser, although he alleged that he purchased it under the representations of the auctioneer as merchantable blue vitriol. (*Id.*)
4. Where the principal question litigated upon the trial was, whether the plaintiff sold his horse to the defendant for \$500, or whether he was delivered to the defendant to be taken to New York by a third person and sold on plaintiff's account, and the testimony of the plaintiff and defendant was directly in conflict upon the question:
5. *Held*, that the plaintiff was properly permitted to show that, on the same day that he claimed to have sold the horse to the defendant, he went to his (plaintiff's) store, and, in the absence of the defendant, made an entry in his book of accounts, charging the defendant with the horse,

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at \$500, and that he subsequently exhibited this entry to the defendant, who admitted its accuracy. (GROVER, J., dissenting.) (Tanner agt. Parshall, ante, 472.)

6. A judicial sale of property in the city of New York on the day of the charter election is not for that reason void. A judicial sale is not the business of a court, within the meaning of the Revised Statutes, declaring that no court shall be opened or transact any business in any city or town on the day of elections. (1 R. S. 5th ed. 148, §§ 4, 5.) (King agt. Platt, 37 N. Y. R. 155.)

7. Where a party directly interested in the price which the property to be sold at a judicial sale shall bring requests that the sale shall not take place on election day, and that if it do so he would consider it "unjust and oppressive;" and also makes a reasonable request as to the order in which the parcels shall be sold, with a view to enhancing the price it may bring, which requests are disregarded without any apparent good cause, and the plaintiff bids in the property, the court, looking into these and similar circumstances, will be justified in setting aside the proceeding and ordering a new sale. (Id.)

8. Occupying a position of advantage, it behooves a plaintiff to pursue his remedy with scrupulous care, not to inflict unnecessary injury on the party within his power; and it is the duty of a court to see that its process is not made unnecessarily oppressive. (Id.)

SATISFACTION.

1. The principal is under an implied obligation to indemnify an innocent agent for obeying his orders, where the act would have been lawful in respect to both, if the principal really had the authority which he claimed. (Howe agt. N. Y. & E. R. R. Co. 37 N. Y. R. 297.)

2. The acceptance by a creditor of the note of the surety, in satisfaction of the demand, is equivalent to payment, as against a party bound to indemnify the surety. (Id.)

3. Where there is a contract for the sale and purchase of land, and a bond and mortgage is given upon other property, to secure a part of the purchase money, and where possession of the land is taken under the contract of purchase, and partial payments on the bond are made, a surrender and cancellation by the parties of the principal contract, and a restoration of possession to the

vendor, works a satisfaction of the bond and mortgage, where there is no agreement between the parties to the contrary. (Eveland agt. Wheeler, 37 N. Y. R. 244.)

SECURITY FOR COSTS.

1. A plaintiff who does not reside in the city of New York, may, though a resident of the state, be required, on commencing a suit in the superior court of the city of New York, to file security for costs. (Bolton agt. Taylor, 3 Robt. 647.)

2. Where an order to file security for costs is peremptory and absolute, and no time is allowed for compliance therewith, the 57th general court rule is applicable, and the plaintiff has twenty days in which to comply with it. (Fresman agt. Young, 3 Robt. 666.)

3. An appeal from such an order does not in itself stay proceedings; and if the plaintiff does not file security within twenty days, the defendant will be entitled to a dismissal of the complaint, unless a stay of proceedings is obtained. (Id.)

SERVICE.

1. An order to show cause issued against a bank is properly served upon its vice-president, especially where it appears that he is also a director, which perhaps might be presumed from his office of vice-president. (People agt. Central City Bank, ante, 428.)

2. Where one of the two applications for the appointment of a receiver—both made on the same day, before different justices, in different judicial districts—obtained the first judicial action by service of papers, of the first granting the order, of the first perfecting of the appointment, by the execution, approval and filing of the required bond, it took precedence of the other, notwithstanding the latter receiver first took actual possession of the property and assets of the bank. (Id.)

3. A service of a summons on a director of a corporation is regular, and will give the court complete jurisdiction of the parties. (Curtis agt. The Aten, Genesee, &c. R. R. Co. 49 Barb. 148.)

SERVICE BY PUBLICATION.

1. The proof required to satisfy the officer granting an order of publication, that the party cannot, after due dili-

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- gence be found within the state, must appear by *affidavit*. The return of a sheriff upon the summons, will not be considered as forming any part of such proof. (*Wagler* agt. *Goble*, ante, 356.)
2. The plaintiff in the action, is a competent person to make the affidavit for an order of publication, as was decided in *Van Wyck* agt. *Hardy* (20 How. Pr. R. 222). (*Id.*)
 3. The statute does not prescribe who shall make the affidavit; but it must show that due diligence has been used; and that the person to be served cannot be found within the state, to the satisfaction of the court or judge. (*Id.*)
 4. The statute does not require the filing of the complaint in a case, where the defendant is served personally out of the state, soon after the order of publication is granted, and where no publication is made. (*Id.*)
 5. Personal service of a copy of the summons and complaint, out of the state, is equivalent to publication and deposit in the post office. (*Code*, § 135.) (*Id.*)
 6. Where the summons is issued and an attachment levied upon defendant's property, more than thirty days before the service of the summons and complaint upon the defendant out of the state, by which the action is deemed to have been commenced (no service by publication having been made), the attachment becomes wholly void, under section 227 of the Code, and will be set aside on motion. But the order of publication will be allowed to stand. (*Id.*)
 3. Besides, if the performance of such condition could be regarded as a violation of the injunction, it would merely subject the plaintiff to punishment as for a contempt, and would not render the receipt or the payment of costs ineffectual or invalid. Therefore the defendant would have no concern in the matter. (*Id.*)
 4. An allowance to a party by way of set-off is always founded on an existing demand in presents, and not on one that may be claimed in futuro. (*Martin* agt. *Kunsmuller*, 37 N. Y. R. 396.)
 5. In an action by an assignee, the defendant cannot offset a note made by the assignor, which fell due after the assignment of the subject of the action was made. (*Id.*)
 6. Where a pledgee of goods employs the owner to sell them, and the latter sells them to a purchaser with notice of the pledgee's lien thereon, for advances, rendering bills stating the price to be payable to the pledgee, and the purchaser agrees to pay the price to the pledgee, the purchaser cannot set off a claim against the owner, in an action by the pledgee for the price of the goods. (*Nettelbladt* agt. *Maas*, 3 Robt. 249.)
 7. One who advances money to an agent or officer of the state, not authorized to borrow money on the credit of the state, acquires no claim, legal or equitable, against the state for repayment, which can be the subject of set-off in an action brought by the state against him, even though the money was required and used by the agent or officer in the performance of his duty as such. (*People* agt. *Brandreth*, 3 Abb. N. S. 224.)
 8. Whether, in any case, an individual sued by the state can interpose a set-off or counter-claim—*quere?* (*Id.*)

SET-OFF.

1. Where the court, in an action to set off judgments, directs such set off upon condition that the plaintiff pay the costs of the supplementary proceedings instituted by the defendant on the judgment against the plaintiff, and deliver to the defendant a receipt, by the plaintiff applying the amount of the defendant's judgment on the judgments held against the defendant by the plaintiff, the defendant cannot refuse to accept such costs and receipt, on the ground that the plaintiff could not properly execute such condition, as he would be violating the injunction in the supplementary proceedings. (*Butler* agt. *Niles*, ante, 329.)
2. The acts required of the plaintiff are authorized by the judgment of the court, which is necessarily a complete justification and protection to him for all acts done under it. (*Id.*)

SHIPS AND VESSELS.

1. Within the contemplation of the act of April 2, 1862, providing for the collection of demands against ships and vessels, and other similar statutes, the place where the services are in fact rendered, although they are rendered under and in pursuance of a contract made at another place, is the place where the debt is deemed to have been contracted. (*Mullin* agt. *Hicks*, 49 Barb. 250.)
2. Thus, where a contract was entered into at the city of New York, between the plaintiff and the master of a ship,

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by which the former agreed to load said ship with oak timber for a specified sum; and the ship—then lying at Brooklyn—was afterwards moved to Weehawken, in the state of New Jersey, where she was loaded by the plaintiff, under and in pursuance of the contract: *Held*, that the sum due to the plaintiff for his services in loading the ship was not a debt contracted within the state of New York, nor a subsisting lien, upon the vessel, for which an attachment could be issued under the act above mentioned (*Id.*)

3. Where a vessel is run by the master, on shares, it is not a chartering, nor does the master become owner, for the time being; and parties dealing with him are justified in considering him clothed with the usual authority of a master; especially where one of the owners indorsed the action of the master, in dealing with such parties, before they gave him credit. (*McCready* agt. *Thorne*, 49 Barb. 438.)
4. Under such circumstances, the master can bind the vessel and her owners, for supplies and necessities furnished. (*Id.*)
5. Where the master testifies that money advanced to him, and expended by the plaintiffs, was for the account of the vessel; that the plaintiffs rendered him an account, and he certified it to be correct; the mere fact that he is unable to state, after the lapse of several years, what the money was expended for, will not weaken the force of such testimony. (*Id.*)
6. The signing of a receipt by a third party without examination, describing the packages shipped as in good order on their re-shipment, furnishes no evidence of the condition of the goods at that time. (*Hunt* agt. *Mich'n South'n & North'n Ind. R. R. Co.* 37 N. Y. R. 162.)
7. Where one of several joint owners of a vessel sails her for the joint benefit of all, each receiving a share of the profits, all are liable for money advanced at the request of the owner sailing her, to pay her necessary expenses, such as port charges and the like. (*Bassett* agt. *Crowell*, 3 Robt. 72.)

SLANDER.

1. Where defendant kept a merchandize agency, whose business it was to obtain information respecting the credit and responsibility of persons in business, and to furnish the same to those who had just occasion to use it, his communication, made in good faith to a sub-

scriber in respect to the character and standing of the plaintiff, is to be deemed confidential. (*Ormsby* agt. *Douglass*, 37 N. Y. R. 477.)

2. Where communications are regarded as privileged, they are protected from the presumption of malice which is usually to be inferred from the charge itself. (*Id.*)
3. When, in an action of slander, it is made to appear that the defendant had just occasion for speaking the words deemed slanderous, then malice is not to be presumed, and additional evidence is necessary to establish the charge. (*Id.*)
4. In case of privileged communications, the presumption of malice being rebutted, the plaintiff must show that the defendant was influenced by other motives than the mere discharge of a duty. (*Id.*)
5. Where the occasion of speaking the words is one which makes the communication *prima facie* privileged, evidence that it was false is not sufficient to raise the presumption of malice. (*Id.*)

SPECIFIC PERFORMANCE.

1. The rule of courts of equity that in some cases time may be regarded as not of the essence of a contract, does not extend so far as to enable a party in default to obtain affirmative relief in equity, in a case where he shows neither any good reason for non-performance by the day named in the contract, nor any peculiar equity. (*Chase* agt. *Hogan*, 3 Abb. N. S. 57.)
2. The general rule applicable in this class of cases is, that time is a circumstance of decisive importance, but that it may be waived by the conduct of the parties; and that it incumbent on a plaintiff who sues for a specific performance, either to show that he has used due diligence to perform the contract, on his part by the day named, or if not, that his negligence arose from some just cause, or has been acquiesced in. (*Id.*)
3. In an action for the specific performance of a contract for the sale of land, it appeared that the plaintiff agreed with the defendant's testator for the purchase from him of the lot of land in question, upon which the vendor was to make the purchaser a building loan. The agreement provided that if the plaintiff should refuse or neglect to complete the building contracted for, or if

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the diligent prosecution of the work thereon should at any time be suspended for ten days, the vendor should have the right to insist on immediate repayment of his advances, and to sell, on ten days' notice to the purchaser, all the purchaser's interest in the premises, and to apply the proceeds, &c. Upon the completion of the building the vendor was to give the purchaser a deed of the lot, and the purchaser was to give back a mortgage for the price of the lot and the building loan. It further appeared, that before the building was completed the purchaser suspended all work upon it, in consequence of which the vendor gave him notice, that he would sell the interest of the purchaser in the contract under the power reserved, unless his advances were repaid; and a sale was accordingly made at public auction, no notice of time or place of sale being given to the purchaser, and the vendor buying in the property. In an action by the purchaser against the executors of the vendor, to compel a performance of the contract of sale and the delivery of the deed: *Held*, 1. That the evidence adduced to show a reason for the purchaser's delay in completing the building was insufficient for that purpose, and the purchaser was therefore not entitled to a specific performance, upon the ground that his own non-performance on the day was excused. 2. That the mere fact that if plaintiff was not relieved he would suffer a loss of time and materials, did not constitute a special equity such as would entitle him to relief within the rule above stated. (*Id.*)

4. The provisions in the contract authorizing the vendor to re-sell for repayment of his advances were not obligatory upon him. It was optional with him to resort to a re-sale, or to wait until the time limited for performance expired, and then, in case of non-performance, treat the contract as at an end, and resume possession of the property, disclaiming the right to re-sell. (*Id.*)
5. The provisions of the contract reviewed with reference to this question; and their construction determined. (*Id.*)
6. Whenever a court of equity declines, by reason of a default on the part of the plaintiff, to decree a specific performance of a contract in his favor, it will also decline to award him damages for the breach. (*Id.*)

STATUTE OF FRAUDS.

1. A verbal promise to sell goods to a responsible party for their full value, and

on the usual terms, forms no consideration for an independent engagement to pay the antecedent debt of a third person. (*Pfeiffer* agt. *Adler*, 37 N. Y. R. 164.)

2. A parol agreement for the sale of goods of the value of fifty dollars or more, deliverable at a future day, of which no memorandum in writing has been made, no portion of the purchase money has been paid, and no part of the goods accepted and received by the buyer at the time, is void by the statute of frauds. The fact that the purchaser, to whom the goods are consigned, subsequent to the making of the contract, accidentally obtains possession of a bill of lading of them on their shipment, but refuses to pay the amount demanded by it, and retains the same without the assent of the vendor, will not take the case out of the statute. (*Brand* agt. *Focht*, 3 Robt. 426.)
3. Where goods are sold on the credit of and charged to one person, but delivered to another, the case is not affected by the statute of frauds. The former becomes the original debtor, and it is an original, and not a collateral undertaking. (*McCaffil* agt. *Radcliff*, 3 Robt. 445.)
4. Such a promise or undertaking need not be in writing; nor need there be any special consideration to uphold it. (*Id.*)

STATUTE OF LIMITATIONS.

1. The successors of a removed administrator, who were also interested in the estate as legatees, filed a petition before the surrogate, praying an accounting by their predecessor, and that he be ordered to pay over the amount found due. Nearly ten years having elapsed between the removal and the petition, the predecessor pleaded the statute of limitations. *Held*, 1. That there being no authority for a petition in the two characters of legatee and successor in administration, and the relief prayed being such as could only be given to persons interested in the estate as legatees, the proceeding must be deemed to be instituted by the petitioner in that character. 2. That, so regarded, it was barred by lapse of time. (*Clark* agt. *Ford*, 3 Abb. N. S. 245.)
2. A demand which has already been outlawed at the death of the original debtor cannot be revived by a part payment made by his administrator. If an administrator has power to revive such a demand at all, without the consent of



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those interested in the estate, it can only be done by his express promise to pay. (*McLaren* agt. *McMartin*, 3 *Abb. N. S.* 315.)

3. An indorsement made upon a note, by the payee, admitting receipt of part payment, is not sufficient, by itself, to prove a part payment for the purpose of removing the bar of the statute of limitations, and enabling the payee to maintain an action for the balance. When so offered, the indorsement must be regarded as a mere declaration, by the payee, in his own favor. (*Id.*)

STATUTES.

1. It is a general rule that a statute affecting rights and liabilities should not be so construed as to act upon those already existing. (*McManus* agt. *Butler*, 37 *N. Y. R.* 176.)
2. The 4th section of the act of April 7, 1863 (*Laws of 1863*, ch. 95), authorizing the Croton Aqueduct Board to construct the work therein mentioned, and to purchase the materials necessary for the same, "at such places and in such manner, by contract, as they may deem the public interests require," is inconsistent with the first section of the act of 1861 (*Laws of 1861*, p. 702), which enacts "that all contracts by and on the behalf of the mayor, aldermen and commonalty of the city of New York, shall be awarded to the lowest bidder for the same, respectively, with adequate security; and every such contract shall be deemed confirmed in and to such lowest bidder at the time of the opening of the bids;" and the act of 1863 being the latest enactment, its effect is to except the Croton Aqueduct Board from the operation of the act of 1861, and, to that extent, to repeal that act. (*The People ex rel. Hackley* agt. *The Croton Aqueduct Board*, 49 *Barb.* 259.)
3. The act of February 10, 1865 (*Laws of 1865*, ch. 29), was not repealed by the act of February 24 (*Laws of 1865*, ch. 41) it being the intention of the legislature that the former act should be considered in full force, notwithstanding the enactment of the latter. (*Powers* agt. *Shepard*, 49 *Barb.* 418.)
4. The provisions of chapter 29 of the laws of 1865, prescribing a maximum sum to be paid for enlisting soldiers, and forbidding the payment of a higher sum by cities, counties, &c., are not unconstitutional. (*Id.*)
5. The 4th section of that act took effect immediately, notwithstanding the provisions of chapter 41 of the laws of 1865, suspending the operation of the sections of chapter 29 incorporated into chapter 41 and there re-enacted. (*Id.*)
6. A new law, giving rights similar to some previously existing in a modified form, is not to be construed as excluding the exercise of the latter in their prior form, unless by express words or unavoidable implication. (*Per ROBERTSON, Ch. J.*) (*The Harlem Gas Light Company* agt. *The Mayor, &c. of New York*, 3 *Robt.* 100.)
1. The distinction between public and private statutes stated. (*Bretz* agt. *The Mayor, &c. of New York*, 3 *Abb. N. S.* 478.)
2. An act enabling the local authorities of a particular city or county to raise money by tax for the payment of certain claims against it, is not a public, but a private act; and the courts cannot take notice of it, unless it is pleaded. (*Id.*)

STAY OF PROCEEDINGS.

1. A stay of proceedings, for the purposes of an appeal, is not vacated, so as to enable the respondent to issue execution upon the judgment appealed from, by a decision of the appeal announced orally and entered on the minutes. To exercise the stay, there must be a formal judgment, entered by the clerk. (*Bowman* agt. *Tallman*, 3 *Robt.* 633.)
2. The issuing of an execution after such decision entered on the minutes, and before the entry of a judgment, is at most a mere irregularity, and as such a motion to vacate it must be made promptly. Such a motion, made several months after the levy of an execution upon the defendant's property issued upon the judgment entered, although he had appealed from it to the court of appeals, was held too late. (*Id.*)

STOCK BROKERS.

1. A court of equity has no general jurisdiction over actions to redeem personal property pawned, without some other circumstances rendering its interference necessary. (*Durant* agt. *Einstein*, ante, 223.)
2. The remedy at law is ample, by tender of the amount due and a possessory action to recover the articles pledged, or damages for their detention. (*Id.*)
3. The only ground of equitable jurisdiction over an action for the redemption

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- of personal property pledged, besides the necessity of a *discovery*, and perhaps an *assignment of the pledge*, is the necessity of *taking an account*. (*Id.*)
4. It is fully settled that the *account* on which equity bases its jurisdiction must be really one; that is, not having only one item on one side and a number of set-offs on the other, but a series of transactions on both sides. (*Id.*)
 5. Where an action is brought to redeem certain securities in the hands of the defendants, as stock brokers, upon paying the amount due thereon, and for an injunction order restraining the defendants from selling such securities until an account can be taken of the amount due the defendants, it cannot be sustained where it appears that the claim on the part of the defendants can only consist of one item—the original advances by them, or so much of it as remains unpaid. (*Id.*)
 6. Every sum paid or to be credited in that account forms a subject of set-off in an action at law, even including any liability of the defendants, as alleged in the complaint, for selling any of the original pledged stock below its market price; as such liability forms a subject of counter-claim in an action for the loan, under the first subdivision of section 150 of the Code. (*Id.*)
 7. *Unliquidated damages*, for an entirely unauthorized sale of pledged stocks or securities, can form no part of an *account* to give jurisdiction to a court of equity. (*Id.*)
 8. Sales of stock below the market price, when duly authorized, would not make the brokers liable for the difference, unless made with an *intent to injure* the principal beyond the mere regulation of the amount due the brokers, as in other cases of abuse of lawful authority. But something besides a mere sale below the market price is necessary to show such intent. (*Id.*)
 9. Brokers who are mere pawnees are not bound to use even the same diligence as an agent to obtain the best price. The latter would not be held liable except for extraordinary negligence, which must be proved, not presumed. There must at least be such recklessness shown in the mode or time of selling as to establish an intent to injure the pawnors, before the pawnees can be made liable for any loss. (*Id.*)
 10. The plaintiff is bound to make out his case affirmatively, and although this court on appeal at general term cannot properly interfere with any decision at special term, founded on conflicting evidence, it may yet do so where that on one side is mere information and belief, and that on the other positive knowledge. (*Id.*)
 11. Upon the evidence in this case, the plaintiff has hardly made out a clear case of sales at higher prices, or of any design by the defendants to lower the market value of the securities; and the mere fact of reporting fictitious sales is not sufficient to sustain the injunction order. (*Id.*)
 12. In the absence of any agreement that a *stock broker* may sell without notice, when stocks fall in price so that the margin does not cover the difference between current rates and the price paid, it would be a breach of good faith and common honesty to allow the owner's property to be sacrificed, without giving him an opportunity to increase his margin and hold the stock for a favorable change in the market. (*Ritter agt. Cushman, ante, 284.*)
 13. Where *coin and securities* are purchased by a *broker* for and held by him for his principal, under an agreement, for a valuable consideration, to carry the securities beyond a certain time, and to hold and not to sell the coin under a specified sum, the *title* to the coin and securities remains in the principal; and if the broker sells them contrary to the agreement, without notice of the time and place of sale, he is liable in damages for a conversion of the property. (*Taylor agt. Ketchum, ante, 289.*)
 14. An offer to prove a custom or usage, that a broker buying stocks for his principal, need not preserve for delivery the indential stocks purchased, but it is sufficient to deliver or sell an equal quantity in value and amount of stocks of the same character; and that on failure of the principal to reimburse his broker, the latter may sell the stocks without notice of the time and place of sale, is not applicable to such a case. Such proposed proof is in contradiction of the contract, and clearly against the rules of law. (*Id.*)
 15. If the transaction is a mere loan of securities for the broker's use, a return of other stocks of like nature, kind and amount is sufficient. (*Id.*)
 16. In an action to recover damages for the conversion of the plaintiff's property, which is gold coin, the measure of damages is properly reached by fixing the value of the coin in currency; and this is the highest market price of the coin converted, between the time of the taking and that of the trial. (*Id.*)

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17. Where one joint owner of stocks brings an action against *stock brokers* for the profits arising on three specified sales of such stocks, amounting to a certain sum, and it turns out on the trial that all the dealings with the brokers in reference to such stocks were had with the *other joint owner*, and the defendants never knew the plaintiff, or that he had any interest in such stocks, and that the defendants' accounts were all kept in the name of such other joint owner:
18. *Held*, that the plaintiff, nevertheless, could maintain his action and recover against the defendants, where it appeared that the plaintiff had purchased the interest of his co-owner or special partner in the transactions, before suit brought, and such transfer was averred in the pleadings. (*Reed* agt. *Jaudon*, ante, 303.)
19. The purchases and sales of such stocks, being in fact for the joint benefit of the plaintiff and his assignor, as between themselves, were none the less on their joint account because the orders were by the assignor alone, without any disclosure of the plaintiff's interest. (*Id.*)
20. If, therefore, it be conceded that there was a certain sum due from the defendants on the claim assigned by the assignor to the plaintiff, as to which there was no dispute, the mere fact that it was the assignor's individual claim, instead of a joint claim with the plaintiff, should not put the latter to a new suit; as it could make no difference to the defendants to whom they made payment, and the transfer to the plaintiff would protect them against any future claim by the assignor. (*Id.*)
21. But it does not follow that the plaintiff is entitled to recover the sum thus ascertained as profits, because it turns out in point of fact that he had an interest in such profits jointly with his assignor. He cannot isolate these items of profits from the assignor's *general account*, and recover them, simply for the reason that he had *no interest in the other transactions* going to make up the whole account from which losses resulted. (*Id.*)
22. The defendants having been permitted and induced to act and deal with the assignor, in ignorance of the plaintiff's interest or rights in the transactions, may insist that the entire dealings shall be closed, as if the assignor only had been interested; that is, they may insist upon all equities existing between the defendants and the plaintiff's assignor alone, as regards the entire dealings, and the plaintiff can recover only such sum as shall appear to be due the assignor on balancing the account. (*Id.*)
23. If an objection is taken, that no such set off or equities are stated in the defendants' answer (which probably is not necessary), an *amendment* would meet the difficulty, and ought at once to be allowed, with a view to substantial justice. (*Id.*)

STOCKHOLDERS.

1. A purchase of stocks by brokers, as agents for another, with an advance of money by the former on account of the latter, upon condition that the principal shall deposit a margin of ten per cent, and deposit a further margin when required by the agents, is not to be considered a pledge of stocks for the payment of a sum of money advanced thereon, and requiring a notice of the time and place of selling the pledge, to make the sale legal. (*Hanks* agt. *Drake*, 49 Barb. 186.)
2. Under such an agreement, the agents have a right, upon the principal's failing to deposit a further margin when required so to do, to sell the stock and close the transaction. (*Id.*)
3. This right to sell arises from the previous violation of the contract on the part of the person for whom the stock was purchased, and who, by neglecting to perform on his part, has terminated the obligation of his agents to hold the stock any longer, and left them at liberty to sell the stock for their own protection. (*Id.*)
4. The notice which the law requires, in the case of the sale of pledged stock as security for the payment of a sum of money advanced thereon, is not required in such a case. (*Id.*)
5. But before the owner of the stock can be called upon, under such a contract, to deposit any additional margin, the agents should give him notice that his margin is diminished; and a reasonable time to comply should be allowed, before the stock can be sold. (*Id.*)
6. Where agents, within two hours after giving notice to their principal that a further margin was required, no time being specified for compliance, sold the stock and rendered an account of sales: *Held*, that the court could not hold, without further evidence, that reasonable time for performance had been given. That to decide that point as matter of law, the facts should appear, by which the court could say the party was able, within the time given, to do

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- the act required, and therefore that the time was reasonable. (*Id.*)
7. Where all the evidence on that subject was that furnished by a former transaction between the same parties. in which, the same notice being given, the agents waited until the next morning, when the deposit was made, and it was satisfactory: *Held*, that the principal had a right to suppose that the same course of dealing which had occurred on the former transaction, and was satisfactory to the agents, was expected in the present case; and if the agents required compliance in any shorter time, that they should have given notice accordingly. (*Id.*)
 8. If the owner of stocks intends to claim that a sale thereof, made by his agents, was void, as being prematurely made, he should dissent at once, and notify the agents of his dissent. (*Id.*)
 9. Where the owner of stocks received information of a sale thereof by his agents, in May, and remained silent until September, when he demanded an account of sales, which was sent to him, with a check for the balance due him, which he indorsed and collected: *Held*, that this amounted to a full ratification of the sale, and that it was too late for him afterwards to seek to set it aside. (*Id.*)
 10. Where scrip, purchased by a person as agent for another, is taken in his own name, and has stood in that way on the books of the corporation for several years, it is a legal inference that it was by consent or permission of the principal. A demand and refusal, in such a case, to transfer, will not give the principal the title to the scrip; and possession, without a transfer, would be of no avail to him. (*Wheeler* agt. *Allen*, 49 *Barb.* 460.)
 11. A party cannot recover scrip, of which the legal title is in the defendant by his permission, in an action of *replevin*, or the corresponding action of *claim and delivery*. If such party desires the identical scrip, his remedy is in equity. If he desires damages only, he can, it seems, maintain an action on the case. (*Id.*)
 12. Where a person employs brokers to purchase stocks for him, upon an agreement that he shall keep a margin of ten per cent upon the par value above market rate, of the shares, in the hands of the brokers, and he fails to do so, whereupon the brokers notify him of a fall in the market price of the shares, and that they require him to furnish more money. to make his margin good, they may, upon his neglecting to comply, sell the stock, at the stock exchange, without further notice to the owner. (*WELLES, J. dissented.*) (*Markham* agt. *Jaudon*, 49 *Barb.* 462.)
 13. There is, under these circumstances, a clear breach of the principal's contract, which justifies the brokers in selling; and the notice of the time and place of sale, required in the case of a sale of pledged stock, need not be given. (*Id.*)
 14. The defendants having testified to an express agreement that the stock purchased by them might be sold, if the margin was not kept good, without any notice of the time or place of sale: *Held*, that it was error for the judge to charge the jury that such an agreement was wholly improbable. (*Id.*)
 15. Where stock is, by the terms of the certificate thereof, "transferrable only in person or by attorney," on the books of the company issuing it, upon the surrender of the certificate, the company is not obliged to allow a transfer to be made upon its books, except upon the application of the owner, in person or by attorney. (*The Mechanics' Banking Association* agt. *The Mariposa Company*, 3 *Robt.* 395.)
 16. Thus, where the defendant issued a certificate in the above form to M. of 473 shares of its capital stock, and a transfer of the stock was demanded by the plaintiff, M. not attending in person or by attorney, but the plaintiff simply presented a power of attorney, signed by M., appointing F. his attorney to transfer to D. & C. 100 shares, and to J. 373 shares of the stock, and certificates from D. & C. and from J., stating that they had no interest in the shares, and that they consented that such shares "be transferred to the person or persons entitled thereto": *Held*, that the defendant was justified in refusing to permit the transfer to be made to the plaintiff. (*MONELL, J. dissented.*) (*Id.*)
 17. Upon a sale of stock, deliverable at a future day, at the option of the seller, a dividend declared before the sale, but not payable until after the day fixed for the delivery of the stock, belongs to the seller, and does not pass to the buyer, under the contract. (*Spear* agt. *Hart*, 3 *Robt.* 420.)
 18. Where several parties become stockholders by subscribing stock for the purpose of establishing a seminary, and each subscribes the amount which he proposes to pay for such purpose, no implied authority can be inferred from

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such promise, warranting any of the parties in contracting debts or advancing money on the credit of the other parties. *Shibley* agt. *Angle*, 37 N. Y. R. 626.)

19. Such subscription agreement is simply one to pay for the stock subscribed in the association to be incorporated, and did not contemplate the conduct of any enterprise as co-partners, nor as members of an unincorporated joint stock association. (*Id.*)

20. Where the plaintiffs, as trustees of such incorporated seminary, proceed to contract debts, expend money, and incur personal liabilities, in the erection and furnishing of said seminary, both before and after the incorporation of the same, they cannot maintain an action against the individual stockholders thereof, to compel a contribution for discharging such debts and obligations. (*Id.*)

21. The articles of association for the purpose of procuring an act of incorporation, and establishing such seminary, do not establish such relations between the stockholders as would authorize the trustees to contract debts or make advances on the credit of their associates. (*Id.*)

22. The objection, that the complaint does not state facts sufficient to constitute a cause of action, may be taken at any stage of the proceedings; and a motion before the referee, to dismiss the action for such cause, is proper. (*Id.*)

23. The secretary of a corporation organized under the laws of 1848, chapter 40, is not a laborer, servant or apprentice of the corporation, within the meaning of the 18th section of said act. (*Coffin* agt. *Reynolds*, 37 N. Y. R. 640.)

24. In an action brought by the secretary of such corporation against the stockholders of the same, for his services as secretary, an averment in the complaint, that the action is for a debt claimed to be due to the plaintiff for services performed by him for the company as "secretary and otherwise, does not state a cause of action. (*Id.*)

STREETS.

1. Where a tax levy law passed by the legislature, for the city of New York, directly appropriates a specified sum for a particular object—repaving and repairing streets, and in pursuance of such law, the common council of the city pass an ordinance formally appropriating the money to such object; a con-

tract for the work and expenditure of the money made by the act under the directions of the street department, must be regarded as made directly by the authority of the legislature, not by the authority of the common council. (*Brady* agt. *Mayor, &c of New York*, ante, 81.)

2. Therefore a city tax payer and cestui que trust of the city property under the 3d section of the act of 1864 cannot maintain an action, under that act, against the common council and the contractor, to restrain them by injunction from making payments under a contract to do the work and to declare the contract void, on the ground that it was not made as provided by law—made without public notice for sealed proposals or bids as required by law, even though the attorney general or the city corporation could maintain such action. (*Id.*)

3. The fund appropriated by the legislature, and which was to be expended under the contract, is not at all, to any extent or in any respect committed to the management of the common council or supervisors of the county, as trustees within the meaning of the act of 1864. (*Id.*)

4. The provisions of the act of 1858, in reference to vacating assessments, &c., are only intended to relieve against fraud or legal irregularity in the proceedings, relative to an assessment or the proceedings to collect the same. (*Matter of Linn* agt. *Mayor, &c. of New York*, ante, 162.)

5. The act does not authorize any inquiry, whether the work has been well done; or whether the contract has been fully performed; or whether the materials used are according to the specifications; or whether the common council had all the surveys and certificates of inspectors as required by the ordinances, except where fraud is alleged to have been committed. (*Id.*)

6. By the act of 1813, the common council of New York are authorized to repair or repave a street, and to charge the expenses upon the property. (*Id.*)

7. The unanimous consent required to the passage of an ordinance by both boards of the common council on the same day, is the consent of all the members present at the time of its passage. And this may appear from the fact that no objection was made at the time, and that all the members present voted for the ordinance. (*Id.*)

8. It is not necessary to publish for two

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days an *amendment* to an original ordinance providing for the expense of repairing a street. A publication under the original ordinance gives notice to the owner of the contemplated improvement, and this satisfies the requirements of the statute. (*Id.*)

9. An objection that no *appropriation* was made by law before the contract was made (*Laws 1857, ch. 446*) is answered by the fact that this provision does not apply to cases where the expense is charged upon the *owners*, and not on the public treasury. (*Id.*)

10. Objections to the mode of doing the work, and the want of proof annexed to the assessment roll, are not grounds for vacating such an assessment. (*Id.*)

11. It is not a valid objection to such an assessment made by the board of assessors, that the assessors *had been changed* between the passage of the ordinance and the signing of the assessment roll. The statute directs the duty of assessing to be done by the *board of assessors* for the time being. It is unnecessary to name the assessors individually in the ordinance. (*Id.*)

12. The assessors cannot include any charge for making the assessment. The allowance of 2 per cent for making such assessment is no longer a legal charge. (*Id.*)

13. The act of 1865, so far as it authorizes the *commissioners of the Central Park*, instead of the common council of the city of New York, to make an application to this court for the *opening of a road or public drive* above Fifty-ninth street, is *not unconstitutional*, whatever may be considered as to the validity of some other portions of that act. (*Matter of Commissioners of Central Park, ante, 255.*)

14. The authority conferred on the commissioners to make such application is not that of any *local officer*, nor does it authorize them to discharge the duties of any *office*, but provides for the discharge of a mere ministerial act. (*Id.*)

15. The common council of the city of New York never had authority, since 1807, to lay out any streets or public places in that part of the city which was embraced in the map of the commissioners filed under the act of 1807. Their power was below the limits embraced in that map. (*Id.*)

16. The act of 1813 expressly limited their powers to that part of the city not laid out by virtue of the act of 1807. They had no authority to lay out or open any

streets or public places but such as were provided for on the said map. (*Id.*)

17. The authority conferred by the legislature upon the commissioners of the Central Park, to make application to lay out a road or public drive between the northerly line of Fifty-ninth street and the southerly line of One Hundred and Fifty-fifth street, did not in any way interfere with the authority previously bestowed upon the common council. (*Id.*)

18. The legislature might have laid out this drive mentioned in the act, and having the power, they might authorize others to do it. (*Id.*)

19. A mere error of judgment of the commissioners in the valuation of property taken for such purpose is not the subject of review on a motion to confirm their report, unless the sum allowed was grossly inadequate and unequal as compared with other valuations, or unless some wrong principle was adopted as to the amount allowed. (*Id.*)

20. This act of 1865 does not authorize the taking of any land by the commissioners not required for the drive or road, which the act provides shall be of a uniform width, and is described in the notice required to be given by the commissioners as follows: "Said road or public drive is of a general width of one hundred and fifty feet, as shown on a certain map," &c. (*Id.*)

21. *Held*, therefore, that the commissioners had no jurisdiction to take gores of land outside of said road or drive, and so far as such gores are included in these proceedings, they are erroneously taken. (*Id.*)

22. After commissioners to estimate the expense and assess the damages of widening a street in a city have been appointed, in pursuance of a special act of the legislature, and have made their final report of estimate and assessment, which has been confirmed by the county court, and the proceedings have been reversed, on certiorari, by judgments of the supreme court, such commissioners have no power to file another report of estimate and assessment, in the same matter, their appointment being annulled by such judgments, and the commissioners being thenceforth *functi officio*. (J. F. BARNARD, J., *dissented.*) (*The People ex rel. Reynolds agt. The City of Brooklyn, 49 Barb. 136.*)

23. In an action for trespass on real estate, the plaintiff claimed to have acquired the title in fee to the premises by a purchase at a foreclosure sale. The de-

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fense was that the plaintiff's title was subject to a public easement or right of way; that the *locus in quo* was a public street; and that the acts complained of were done by the defendant in the rightful exercise of his authority as street superintendent, and by the direction of the common council of the city of Rochester, who had control of the streets of the city. The only evidence to prove the existence of the alleged street consisted of testimony tending to show a dedication and user; but there was no proof of an effective dedication prior to the execution of the mortgage in 1857, at a sale under which the plaintiff became purchaser; the only evidence looking that way being a map, made and filed in 1826, on which the premises were marked as a part of a street. But there was no proof of an acceptance by the city, nor that the parties who made and filed the map ever owned the premises, or had any right or authority to dedicate them: *Held*, that the evidence was insufficient to show a dedication of the premises to the public. (*McMannis* agt. *Butler*, 49 Barb. 176.)

24. It was also proved, that in 1858, the city authorities caused a street, including the premises in question to be improved and worked; that in so doing, the defendant, as street superintendent, tore down a house upon the premises, with the consent of the owner, and the city paid him the value of it; and that ever since, the street, including the premises in question, had remained open, and had been used as a public highway, under the control of the city authorities, with the exception of certain acts of occupation by the plaintiff. The defendant claimed that the city had an interest in the premises, by virtue of the purchase from the former owner (the mortgagor), and was not served with notice of the foreclosure proceedings; that the plaintiff therefore was not entitled to assert possession of the premises, to the exclusion of the city, at the time of the alleged trespass: *Held*, that if the city was not served with notice, the only consequence was that, as to it, the mortgage was unenforced, and the plaintiff was to be regarded as a mortgagee in possession. That his mortgage being past due, and paramount to the rights of the city, was sufficient to maintain his possession, as against the defendant. (*Id.*)

25. Section 156 of chapter 143 of the laws of 1861 (being an act in relation to the city of Rochester), which directs that "whenever any street, alley or lane shall have been open to and used as

such by the public, for the period of five years, the same shall thereby become a street, alley or lane for all purposes, and the said common council shall have the same authority and jurisdiction over, and right and interest in the same, as they have by law over the streets, alleys and lanes laid out by it," was not intended to have a retroactive effect, so as to divest parties of existing rights, or to justify trespasses committed before it was passed. (*Id.*)

26. Upon an application for the confirmation of the report of commissioners in the matter of the extension of a street in the city of New York, the question of the necessity or propriety of the improvement is not before the court, the consideration of that subject having been conferred by law upon the discretion of the common council, who pass upon it before the application to the court for the appointment of commissioners. (*Matter of the Extension of Church street*, 49 Barb. 455.)

27. In respect to the area of assessment, for benefit for a street improvement, a wide discretion has been conferred by law upon the commissioners. They are authorized to extend their assessments to any hands they deem benefited and appear to be vested with the sole discretion, in this respect. The statute takes the subject out of any review by the courts. The question is practically one of fact, and not of law. (*Id.*)

28. The city parks and markets have the same value as property, as other lands, and it is but just that they should bear a *pro rata* assessment for public improvements. (*Id.*)

29. Where a board of commissioners of assessments, in the matter of a street extension, was regularly organized, all appearing and taking the oath of office; and one of the number, with others, agreed upon future meetings on a day fixed of the week, and met with the others, on several occasions, and transacted some business; was notified in writing of several meetings; and being notified orally, made partial promises to attend particular meetings; did not resign, or notify his associates that he would act in the matter; and they were not aware that he objected to act or confer with them (unless it was to be inferred from his neglect to attend their meetings), until his final refusal to sign the report: *Held*, that a report signed by a majority of the commissioners was to be deemed the act of the whole. (*Id.*)

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SUBSCRIPTION.

1. Where several parties become stockholders by subscribing stock for the purpose of establishing a seminary, and each subscribes the amount which he proposes to pay for such purpose, no implied warranty can be inferred from such promise, warranting any of the parties in contracting debts or advancing money on the credit of the other parties. (*Sibley* agt. *Angle*, 37 N. Y. R. 626.)
2. Such subscription agreement is simply one to pay for the stock subscribed in the association to be incorporated, and did not contemplate the conduct of any enterprise as co partners, nor as members of an unincorporated joint stock association. (*Id.*)
3. Where the plaintiffs, as trustees of such incorporated seminary, proceed to contract debts, expend money and incur personal liabilities in the erection and furnishing of said seminary, both before and after the incorporation of the same, they cannot maintain an action against the individual stockholders thereof, to compel a contribution for discharging such debts and obligations. (*Id.*)
4. The articles of association, for the purpose of procuring an act of incorporation and establishing such seminary, do not establish such relations between the stockholders as would authorize the trustees to contract debts or make advances on the credit of their associators. (*Id.*)

SUMMONS.

1. *It seems*, that in an action for unliquidated damages, although arising upon contract, the summons should be for relief, and not for a sum certain. (*Garrison* agt. *Carr*, 3 Abb. N. S. 236.)

SUPERINTENDENT OF THE POOR.

1. The office of superintendent of the poor, though invested with corporate powers, is, notwithstanding a mere agency of the county; and the relation between the county and its superintendent is that of principal and agent. (*People* agt. *Bennett*, 37 N. Y. R. 117.)

SUPPLEMENTARY PROCEEDINGS.

1. On appeal from an order appointing a receiver in supplementary proceedings, objections to the preliminary affidavit upon which the proceedings were originally founded cannot be entertained,

where there is nothing in the papers to show that such objections were made before the county judge, or that he made any decision relating to them. (*Union Bank of Troy* agt. *Sargeant*, ante, 87.)

2. The proper remedy in such case would have been to have made a motion to vacate the original order. (*Id.*)
3. The objection that the execution appears to have been issued after the expiration of five years from the entry of judgment, cannot be entertained on such appeal. If the execution was improperly issued, the defendant should have applied to the court to set it aside for irregularity. (*Id.*)
1. Proceedings supplementary to execution are proceedings in the action, not special proceedings, designated by the Code. (*Seeley* agt. *Black*, ante, 369.)
5. Consequently the proceeding by attachment, for a violation of an order in supplementary proceedings, is a proceeding in the action; and costs therein should be taxed as costs in the action, and not as costs of an action, which are allowed in special proceedings. (*Id.*)
6. Supplementary proceedings to compel the debtors to pay the debt upon and toward the satisfaction of a judgment against their creditor, may be taken under section 294, without any proceeding against the creditor (the judgment debtor) under section 292 for his examination. The proceedings authorized by these two sections, respectively, are independent of each other. (*Gibson* agt. *Haggerty*, 37 N. Y. R. 555.)
7. Whether notice shall be given to the judgment debtor of the proceedings under section 294 rests in the discretion of the judge. (*Id.*)
8. In an action by a receiver appointed in supplementary proceedings instituted upon a judgment recovered in the common pleas, the complaint did not state that a transcript of the judgment had been docketed in the office of the county clerk. The defendant, however, without interposing a demurrer, went to trial upon the merits, and the proof then showed that the judgment debtor owned no real property. *Held*, 1. That it was not necessary that the affidavit to obtain an order for examination should show that a transcript had been filed in the office of the county clerk. 2. That the defect, if it were one, might be remedied by amendment. (*Kennedy* agt. *Thorp*, 3 Abb. N. S. 131.)
9. The cases arising upon judgments ob-

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tained in the district courts of the city of New York distinguished. (*Id.*)

10. The proper method of obtaining the attendance of a witness before a county judge, upon a hearing in supplementary proceedings, is by a subpoena issued out of the court in which the judgment is obtained; and disobedience to such subpoena should be tried and punished by that court. (*People ex rel. Brunett agt. Dutcher*. 3 Abb. N. S. 152.)

SUPREME COURT.

1. Where an objection is made to an order to show cause, that it was not made at a regularly adjourned special term, it will not be presumed that the order was made at a term irregularly held. (*People agt. Central City Bank*, ante, 428.)
2. Where the court has been regularly convened, it continues open till actually adjourned; an order for its continuance is not essential; and an order made by the court that it should so continue, is not necessary to be entered with the clerk; and if it was, it could be entered *nunc pro tunc*, in order to sustain otherwise regular proceedings had under the order. (*Id.*)
3. Where an order is properly granted by the court in an action or proceeding, the delay or omission of a clerk to make actual and speedy entry of it in the minutes of the court—as it is his duty, without any special directions to that effect—cannot be allowed to prejudice the substantial rights of parties. (*Id.*)
4. The supreme court has no power to grant an injunction order in one action, staying proceedings in another action pending in the same court; nor in another court having full jurisdiction over the subject matter. (*Schell agt. Erie Railway Co.* ante, 438.)

SURETIES.

1. The rights and obligations of sureties, *inter se*, are the same whether they are bound under one or several like obligations for the same principal and for the same debt or default; and where there are several distinct bonds with several and distinct penalties, contribution between them is in proportion to the penalties of their respective bonds. (*Armistage agt. Pulver*, 37 N. Y. R. 494.)
2. In the above instance, the plaintiff had executed his bond as surety, in the penal sum of \$2,000, and the defendants had executed their bond in the penal sum of \$18,000, each for the same principal,

and for the same debt, &c.: *Held*, that they were liable in the ratio of one-tenth and of nine-tenths, or in the ratio of the penalties of their respective bonds, and that contribution might be compelled accordingly. (*Id.*)

3. Taking an assignment of partnership property and assuming its liabilities is within the rule that assumption of a new liability is a sufficient consideration to constitute the party a purchaser in good faith. (*Williams agt. Shelly*, 37 N. Y. R. 375.)
4. A surety who covenants for the payment of rent by his principal on a lease for years, wherein it is stipulated that the time for the commencement of the rent should be fixed by the award of two arbitrators named, and wherein a mode was fixed for the appointment of new arbitrator, in case either of those named should refuse or become unable to act, is bound by the acts of the lessee in fixing the time for the commencement of the rent and the appointment of a new arbitrator, subject to the right to show fraud, collusion, or (if he had no notice) that the principal had a good defense, which he neglected to interfere, he is bound by the acts of his principal, and by the determination of the arbitrators. (*Biasse agt. Wood*, 37 N. Y. R. 526.)
5. The instruments and evidence in the proceedings between the principals by which the amount of rent was fixed, are evidence in the suit against the surety. (*Id.*)

TAXES AND ASSESSMENTS.

1. A foreign corporation doing business in this state is to be regarded as non-resident; and it is to be assessed and taxed upon all moneys in any manner invested in this state, the same as if it was a resident corporation; and the securities deposited with the comptroller are personal property, liable to taxation. Such an insurance corporation cannot exempt itself from this taxation, on the ground that it is not doing business in this state, by alleging and proving that it is now confined to collecting premiums and paying losses on old policies; and that it issues no new policies. This must be considered, "doing business," within the meaning of the statute, although it may be contracted. (*Smyth agt. International Life Assurance Co.* ante, 126.)
2. The remedy by the receiver of taxes, for the collection and payment of such taxes from such corporations, is the same as against individuals. (*Id.*)

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3. The provisions of the act of 1858, in reference to vacating assessments, &c., are only intended to relieve against fraud or legal irregularity in the proceedings, relative to an assessment or the proceedings to collect the same. (*Matter of Lewis* agt. Mayor, &c. of New York, ante, 162.)
4. The act does not authorize any inquiry, whether the work has been well done; or whether the contract has been fully performed; or whether the materials used are according to the specifications; or whether the common council had all the surveys and certificates of inspectors as required by the ordinances, except where fraud is alleged to have been committed. (*Id.*)
5. By the act of 1813, the common council of New York are authorized to repair or repave a street, and to charge the expenses upon the property. (*Id.*)
6. The unanimous consent required to the passage of an ordinance by both boards of the common council on the same day, is the consent of all the members present at the time of its passage. And this may appear from the fact that no objection was made at the time, and that all the members present voted for the ordinance. (*Id.*)
7. It is not necessary to publish for two days an amendment to an original ordinance providing for the expense of repairing a street. A publication under the original ordinance gives notice to the owner of the contemplated improvement, and this satisfies the requirements of the statute. (*Id.*)
8. An objection that no appropriation was made by law before the contract was made (*Laws* 1857, ch. 446) is answered by the fact that this provision does not apply to cases where the expense is charged upon the owners, and not on the public treasury. (*Id.*)
9. Objections to the mode of doing the work, and the want of proof annexed to the assessment roll, are not grounds for vacating such an assessment. (*Id.*)
10. It is not a valid objection to such an assessment made by the board of assessors, that the assessors had been changed between the passage of the ordinance and the signing of the assessment roll. The statute directs the duty of assessing to be done by the board of assessors for the time being. It is unnecessary to name the assessors individually in the ordinance. (*Id.*)
11. The assessors cannot include any charge for making the assessment. The allowance of 2 per cent for making such assessment is no longer a legal charge. (*Id.*)
12. The provisions of the statutes of the United States, exempting from taxation under state or municipal authority the stocks issued by the United States government, are to be restricted in their application to the subject matter in hand. The general language thus used is to be applied only to the issues authorized by such acts. (*People ex rel. Broadway National Bank* agt. Mayor, &c. of New York, 37 N. Y. R. 9.)
13. A congressional declaration of exemption from taxation is of no force. The exemption is constitutional, and not legislative. Whatever subject is thus exempt is equally exempt if no declaration is made in the law authorizing its creation. If not exempt by virtue of the constitution, a congressional declaration cannot make it so. (*Id.*)
14. Certificates of indebtedness issued under the act of congress of March 1, 1862, are not exempt from taxation by state or municipal authority. They are not issued upon loans made to the government, but are acknowledgments merely of a pre-existing indebtedness. Neither are they to be deemed instrumentalities of the government, like ships of war or the mails, necessary to carry on its business, and thus exempt from taxation. (*Id.*)
15. Legal tender notes, issued under the act of congress of February 25, 1862, are not exempt from state or municipal taxation. They are the money of the country, and liable to taxation, like the other money of the country. (*People &c.* agt. Supervisors of New York, 37 N. Y. R. 21.)
16. Whenever, by state law, a tax is laid upon property which consists of United States bonds exempt from taxation, then, in whatever form or in whatever terms the law is expressed, it is void, and cannot be enforced. (*Monroe Savings Bank* agt. City of Rochester, 37 N. Y. R. 365.)
17. But where the tax is declared in terms to be upon franchises and privileges granted to the corporation, it is not to be deemed void because such corporation employs the bonds, etc., of the United States as one of the means of accomplishing its purposes. (*Id.*)
18. Because a bank has, as a part of its franchise, the privilege of investing its money in United States bonds, it is not, therefore, to hold its franchise exempt from taxation. *Id.*

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19. The state, in granting a franchise to a corporation, may limit the powers to be exercised under it, and annex conditions to its enjoyment, and require it to contribute to the resources of the state. (*Id.*)

TAX LEVY LAW.

1. Where a *tax levy law* passed by the legislature, for the city of New York, directly appropriates a specified sum for a particular object—repaving and repairing streets, and in pursuance of such law, the common council of the city pass an ordinance formally appropriating the money to such object; a *contract* for the work and expenditure of the money made by the act under the directions of the street department, must be regarded as made directly by the authority of the legislature, not by the authority of the common council. (*Brady* agt. *Mayor, &c of New York, ante, 81.*)
2. Therefore a city *tax payer* and *cestui que trust* of the city property under the 3d section of the act of 1864 cannot maintain an action, under that act, against the common council and the contractor, to restrain them by injunction from making payments under a contract to do the work and to declare the contract void, on the ground that it was not made as provided by law—made without public notice for sealed proposals or bids as required by law, even though the *attorney general* or the *city corporation* could maintain such action. (*Id.*)
3. The fund appropriated by the legislature, and which was to be expended under the contract, is not at all, to any extent or in any respect committed to the management of the common council or supervisors of the county, as *trustees* within the meaning of the act of 1864. (*Id.*)
1. The act entitled "An act to enable the board of supervisors of the county of New York to raise money by tax for the use of the corporation of the city of New York, and in relation to the expenditure thereof; and to provide for the auditing and payment of unsettled claims against said city, in relation to actions at law against said corporation," passed April 23, 1867, is a *public statute*, and need not be *pleaded* to give the court jurisdiction to notice it. (*Bretz* agt. *Mayor, &c. N. Y. ante, 130.*)

TELEGRAMS.

1. When and to what extent telegrams

between parties are to be treated as written contracts, depends upon the circumstances in which they are sent and the intent and object for which they are transmitted and received. (*Beach* agt. *Raritan and Delaware Bay Railroad Company, 37 N. Y. R. 457.*)

2. Where there has been a previous communication between the parties in respect to the subject matter of the contract, and the telegram is sent to fix some one of the details of the agreement between them, as the price, time of enjoyment, etc., such telegram is evidence only for the purpose for which it was sent, and does not constitute the contract. (*Id.*)
3. Where the original propositions or agreement between the parties were oral, they are to be proved by oral evidence, as modified or affected by the telegram. (*Id.*)
4. Where plaintiffs had hired out their barge to be used only as a receiving barge in the dock, and it was used by the defendants as a transporting barge, and was thereby sunk, *held*, that the defendants are liable in an action in the nature of trover for the value of the barge, independent of any question of negligence in their manner of using the same. (*Id.*)

TENANTS IN COMMON.

1. Tenants in common must join in actions to recover for injuries to the realty; and this rule has not been changed by the Code. (*De Pay* agt. *Strong, 37 N. Y. R. 372.*)

TIME OF PERFORMANCE.

1. Where a grantor, in executing a deed of land, excepts and reserves "all the pine and hemlock timber suitable for sawing, and all necessary facilities for removing the same, with the right of flowing the lands now covered by the mill pond, while necessary for manufacturing the timber on the adjacent lands," he cannot be deprived of his property or reserved rights by an allegation that a *reasonable time* for removal and manufacture *has already elapsed*, and therefore his rights are extinguished. (*Gregg* agt. *Birdsall, ante, 345.*)
2. If any time could be fixed by the act of the adverse party—the owner of the premises, or by a judicial tribunal within which the power of removal and manufacture was to be exercised (which is doubtful, as the exception is absolute and unlimited), it should be in the future,

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by a notice given to the grantor to exercise his power of removal within some time to be named, so as to enable him to obtain the benefit of his reservation. (*Id.*)

3. In cases of service by publication, the computation of time is to be made excluding the first day and including the full period required for publication. (*Brod agt. Heymann, 3 Abb. N. S. 396.*)
4. The period required is six weeks—forty-two days. (*Id.*)

TITLE.

1. Where a contract for the purchase of a lot of land is conditioned that a conveyance is not to be given until the terms of the contract are performed, by the payment of the whole purchase money, \$500, in yearly payments, and at the expiration of the time for the payment of the whole there remains a balance due and unpaid of \$200, and the vendor thereupon declares the contract void, and proceeds in an action of ejectment and gets possession of the premises, the vendee and those under whom he claims, never having paid or tendered the amount due upon the contract, have no claim legally or equitably to the title of the premises. (*Goodwin agt. Nelin, ante, 402.*)
2. When the defendants had bought certain railroad cars, paid for them and received them into their possession, and the seller afterwards induces the plaintiffs to pay him for the same cars, upon the fraudulent representation that he has delivered them to their agent, the plaintiffs must bear the loss. A charge, under such circumstances, that, if the defendants knew or had reason to believe that, upon a failure to give notice of their title, the defendants would pay the seller for the same cars, unaccompanied by any evidence of collusion between the seller and the first purchaser, is erroneous. Their own title being complete, there is no rule of law which would require the defendants to interfere in the affairs of the other parties; especially, in a case where, by the provisions of the contract, the purchasers had provided full means to protect themselves against such a fraud. (*Ohio and Mississippi Railroad Company agt. Kason, 37 N. Y. B. 218.*)
3. The question of usury is personal, and can only be raised by the parties to the transaction. (*Id.*)

TOWN.

1. An action will not lie against a town,

to recover a claim arising upon contract. (*Bell agt. The Town of Esopus, 49 Barb. 506.*)

2. Parties who contract to render services for either town or county do it with a knowledge that their remedy, to procure payment, is through the action of the board of supervisors. Where that body neglect or refuse to discharge a duty fairly imposed by law, performance will be compelled by mandamus. (*Id.*)

TRADE MARKS.

1. A person who forms a new composition, and invents a new word to characterize it, is entitled to be protected in the exclusive use of such word as his trade-mark, and an injunction will issue to restrain others from appropriating it to designate a similar article. (*Caswell agt. Davis, ante, 76.*)
2. Plaintiff had invented a "new medicine," and formed the compound word "Ferro-Phosphorated" to designate it. Such combined word was new:
3. Held, that he was entitled to the exclusive use of such compound word, and that others could be restrained by injunction from using it. (*Id.*)
4. The plaintiffs had, prior to January, 1866, for many years, at or near the village of Akron, in Erie county, N. Y., manufactured largely from the quarries there, water lime or cement, which was usually sold in barrels, with a printed bill pasted upon the barrels thus: "Newman's Akron Cement Company, manufacture, at Akron, N. Y.; the Hydraulic Cement, known as the Akron Water Lime." Part of this bill was printed in capitals, "Newman's Akron Cement Co.," and "Akron Water Lime" in large capitals.
5. The defendants were a firm manufacturing and selling water lime or cement from a quarry or bed in Syracuse, Onondaga county, N. Y., which they in January, 1866, re-named, and called it "Onondaga Akron Cement or Water Lime." The word "Akron" was not used in connection with their quarry until January, 1866. The defendants, in selling their cement, used the brand "Alvord's Onondaga Akron Cement or Water Lime, manufactured in Syracuse, in New York;" and they knew of the plaintiffs' quarries, and the name given to their water lime or cement:
6. Held, that the defendants, by the use of the name or word "Akron," in sell-

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ing their cement, infringed upon the plaintiffs' trade mark; and the plaintiffs were entitled to a perpetual injunction, restraining the defendants from the use of that word. (*Newman* agt. *Alvord*, ante, 108.)

7. *It seems*, that if the defendant's quarry and manufacture had been located at Akron also, they would have had an equal right with the plaintiffs to have used the name of Akron in their trade mark, within the principle of the case of *Brooklyn White Lead Co.* agt. *Masury* (25 Barb. 416); and that if both parties had had their quarries and manufactories at another place than Akron, both would have had an equal right to use the name Akron in their trade marks, within the principle of the case of *Wolf* agt. *Goulard* (18 How. 64). (*Id.*)
8. A manufacturer has a right to put or stamp his own name on the articles manufactured by him, and on the bands, wrappers or covers, in which they are put up; and any injury which another manufacturer, of the same surname, may suffer thereby, must be viewed as an injury without a remedy. (*Faber* agt. *Faber*, 49 Barb. 347.)
9. A manufacturer of lead pencils has no right to the exclusive use of a particular colored paper, or kind of paper, for covering or inclosing his pencils by the gross, in a book form, or any other particular form. (*Id.*)
10. The plaintiffs were engaged in the business of manufacturing cement, or water lime, from quarries or beds lying near Akron, Erie county, designated and sold as "Akron Cement" and "Akron Water Lime;" the packages containing the same, when sold and offered for sale, having attached to each of them these words: "Newman's Akron Cement Co. Manufactured at Akron, N. Y. The Hydraulic Cement known as the Akron Water Lime." The defendants being engaged in manufacturing and selling a similar article from quarries or beds situated near Syracuse, Onondaga county, and knowing that water lime cement was manufactured and sold by the plaintiffs under the name of "Akron Water Lime" and "Akron Cement," called their own beds the "Onondaga Akron Cement and Water Lime;" and after that they sold the water lime and cement prepared by them with a label on each package having these words upon it: "Alvord's Onondaga Akron Cement, or Water Lime, Manufactured at Syracuse, New York;" such water lime and cement being placed upon the market and sold in the same places

where that manufactured by the plaintiffs was sold and used. *Held*, that the word "Akron," as used by the plaintiffs, was their trade mark, by which they designated the article manufactured and sold by them; and that they were entitled to be protected in such use of it, by an injunction restraining the defendants from making use of the word "Akron" as their trade mark. (*Newman* agt. *Alvord*, 49 Barb. 588.)

11. *Held, also*, that the case was not one of such doubt as to require the plaintiffs' right to be first established at law. (*Id.*)
12. *Held, further*, that to defeat the plaintiffs' right to appropriate the term "Akron," on the ground that it had previously been in common use, such a use of it must be shown as would extend to and include the defendants. That until that was done, the use made of it by the plaintiffs might well be exclusive of the defendants, without being so as to the inhabitants of Akron. (*Id.*)
13. The court will not enjoin a defendant from using his own name in the prosecution of a manufacturing business, because it is similar to that of a rival manufacturer in the same business. Any injury which one manufacturer may suffer by competition of other persons of the same name, from the use of such name merely, is without remedy under the law of trade marks. (*Faber* agt. *Faber*, 3 Abb. N. S. 115.)
14. What mode of putting up and selling pencils, singly or in quantities, will be deemed an imitation of the method of a prior manufacturer, and a violation of his trade mark, considered. (*Id.*)

TRESPASS ON LAND.

1. Where the plaintiff brings an action in a justice's court, and complains that the defendant wrongfully broke and entered his close, and then and there, at the times named, committed certain trespasses and did certain acts, and the defendant justifies all the acts complained of, on the ground that the locus in quo was at the time a public highway, &c., the justice should dismiss the action upon the question of title. (*Heath* agt. *Barmour*, ante, 1.)
2. But if the plaintiff, on continuing the action in the supreme court, recovers a verdict for any sum, for trespasses committed outside of the alleged highway, he is entitled to costs, although the defendant succeeds in justifying all his acts committed upon said highway. (*This*

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agrees with Hall agt. *Hodskins*, 30 *How.* 15.) (*Id.*)

3. In an action of trespass on land, commenced in the supreme court by reason of a plea of *title* interposed in the justice's court, and the supreme court found that the defendant had title to so much of the premises as he pleaded title to; and that the trespasses committed by defendant, for which the court gave plaintiff judgment for \$5, were committed on the piece of land to which the defendant *omitted to plead title*; and that as to such trespasses the title was not in issue; and that the defendant did not controvert the plaintiff's title to or possession thereof on the trial:

4. *Held*, that the plaintiff having failed to recover \$50 damages, the defendant was entitled to costs. To entitle the plaintiff to costs in such an action, under the Code, the judgment in the supreme court must be for the plaintiff on the issue presented by the plea of *title*. (*Morse* agt. *Jacobs*, ante, 90.)

5. It is only those issues which are covered by a plea of *title*, which are intended to go up to the supreme court at all; as to the other issues or causes of action, they should be continued before the justice, on the plaintiff's motion; otherwise, if proceeded with in the supreme court, they have no influence on the question of costs. (*It will be seen that this decision agrees with that in Heath* agt. *Barmour*, ante, p. 1, and the note made thereto. This case was received after the case of *Heath* agt. *Barmour* and note were put in print.) (*Id.*)

TRIAL.

1. Whether a case is of legal or equitable cognizance, whether it was tried before a judge and jury, or before the court alone, a party may entitle himself to a review of a decision denying his motion to postpone for the absence of a material witness, in either of these modes: 1. On the denial of his motion he may withdraw from the trial; and if it proceeds, and the cause is decided against him, he may, upon affidavits showing the application to postpone, the papers upon which it was founded, its denial, and that a decision has been made against him, make a non-enumerated motion at special term to set aside such decision. 2. Or he may remain and try the cause on the merits; and, in case of a decision against him, he may then either pursue the course above stated to obtain a new trial, or, if the trial was by jury, he may move at special

term, upon a case, for a new trial, alleging as one of the grounds of error the refusal to postpone; or, if the trial was by the court, he may appeal direct to the general term, alleging the refusal to postpone as cause for reversal. (*Howard* agt. *Freeman*, 3 *Abb. N. S.* 292.)

2. The former practice of the court of chancery, in respect to granting extensions of time in which to take the testimony of witnesses, stated. (*Id.*)

3. Under the union of legal and equitable forms of action, which has been introduced by the Code of Procedure, the grounds upon which a party may claim a postponement of a trial for the absence of a material witness are the same in actions for equitable relief as in those for relief of a legal character. In both classes of cases, a party has the right, when a cause is called for trial, to move for a postponement; and, as a concomitant to this right, he is further entitled to a review of a decision denying his motion. (*Id.*)

4. It is competent for the presiding judge to try a challenge to the favor, upon consent of parties; and where he does try it, without objection or request to submit the challenge to triers being made at the time, it will be implied that he did so by consent. (*O'Brien* agt. *People*, 3 *Abb. N. S.* 368.)

5. General impressions, relative to the cause about to be tried, derived from reading statements in the newspapers, and not amounting to an opinion upon the guilt or innocence of the prisoner, do not disqualify a person from serving upon the jury. (*Id.*)

6. A venireman, summoned to try a capital cause, testified, upon challenge for principal cause, that he had conscientious scruples against finding a verdict in a case involving life and death, but explained that he was not opposed to capital punishment, but his scruples rested on other grounds, *held*, that he was disqualified. The grounds of his scruples were unimportant; it was enough that they existed. (*Id.*)

7. Error in an answer given by the judge to a question put by a juror, on a criminal trial, will not affect the conviction, where the question had clearly no pertinency to the case made by the evidence, and no clearer or more particular instructions upon the subject of it than those previously given by the judge in his charge were, in any aspect of the case, necessary. (*Id.*)

8. On a trial for murder, the indictment

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- containing two counts—one for killing M., and one for killing S.—the prisoner's counsel asked the court, at the outset, to require the district attorney to elect upon which he would proceed. The court reserved its decision and no objection thereto was made. The evidence showed that the deceased was known by both the names used in the indictment. At the close of the evidence, the court required the district attorney to elect. He elected to proceed under the count for killing S. A *nolle prosequi* was then entered upon the other count. The counsel for prisoner then moved to strike out all evidence referring to the party under the name of M.; the motion was granted, and the jury found a verdict of guilty. *Held*, that no error was committed; and that, there being ample evidence of the killing S., after striking out all that related to M., the verdict must be sustained. (*Id.*)
9. Goods purchased of the plaintiffs were ordered by the buyer to be marked with the name of the defendant, and charged to him, and shipped to St. Louis. Before charging the goods, or shipping them, the plaintiffs informed the defendant of the purchase, and that the goods so bought had been charged to him. The latter, upon being asked if that was correct, replied: "It is all right for this time," &c. The plaintiffs thereupon charged the goods to the defendant, and shipped them as directed by the buyer. *Held*, that the question whether the goods were sold on the credit of the defendant was a question of fact, which should have been submitted to the jury; and that the judge erred in dismissing the complaint. (*McCaffil* agt. *Radcliff*, 3 *Robt.* 445.)
10. The rule is well settled that findings of fact by a judge at special must be deemed conclusive, unless they are without evidence to support them, or clearly against an overwhelming weight of evidence. (*Loeschigk* agt. *Peck*, 3 *Robt.* 700.)
11. In an action to set aside a sale of goods and an assignment, by the vendor of promissory notes received therefor, as fraudulent, the solvency of the purchaser, and the fairness of the sale to him, or the credit given, if the evidence is doubtful, are entirely questions of fact. (*Id.*)
12. If the general good standing of the purchaser is proved affirmatively, and no evidence is given to show the length of credit unreasonable, in reference to the particular kind of merchandise, the court is bound to find for the defendants; and if it do so, it will not be exercising a sound legal discretion by withholding costs from the prevailing party. (*Id.*)
13. A receiver, substituted in the place of one who has died, who moves for leave to continue in his own name as such receiver an action begun by the latter, by supplemental complaint, after it has become barred by the statute of limitations, may be required, as a condition of granting the relief sought, to assume the *onus probandi*. (*Livingston* agt. *Oliphant*, 3 *Robt.* 639.)
14. A trial by the court without a jury cannot properly be held before several judges, in succession, so as, after being decided in part by one, to be taken up at a subsequent term and completed by another justice. A cause cannot thus be determined by piece-meal. (*Belmont* agt. *Pouvert*, 3 *Robt.* 693.)
15. After the plaintiff, in an action for a libel, has, upon the defendant's failure to appear, procured an order for the assessment of damages by a sheriff's jury, he cannot move to vacate that order, and have the damages assessed by a jury before a judge of the court; if the probability of complicated questions of law arising in the case, or the existence of any incapacity on the part of the sheriff to act, or any difficulty in regard to mitigating circumstances be shown, and nothing new appears to have been discovered, rendering it proper that the change should be made. (*Joannes* agt. *Fisk*, 3 *Robt.* 710.)

TROVER.

6. An action of *trover* will not lie for the omission of a common carrier to deliver property, as where the property has been stolen or lost through negligence, and so cannot be delivered to the owner. The remedy is *assumpsit* or a special action on the case. (*McCune*, J., dissenting: Holding that section 69 of the Code has abolished all distinctions between the mere forms of actions, and every action is now a special action on the case.) (*Tolano* agt. *Steam Navigation Co.* ante, 496.)

TRUST AND TRUSTEES.

1. In an action against a trustee of a manufacturing corporation incorporated under the general law of the state, to recover the penalty—the debt contracted by the corporation—for neglecting to file an annual report required by said

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- act, the complaint is fatally defective where it does not allege that the *debt was existing at the time the default was made* by the trustees to file their report. (*McHarg* agt. *Eastman*, ante, 205.)
2. Where the complaint does not allege that the debt against the corporation is unpaid, or that it was unpaid when the trustees failed to make their report, but avers that the judgment (which was previously recovered against the corporation for the debt) and debt have been assigned to the plaintiff, and "there is now due to the plaintiff from the defendant the sum of \$899.04," the complaint *held* defective within the case of *Chambers* agt. *Lewis* (28 N. Y. R. 454). (*Id.*)
 3. The complaint in such an action must also allege that the defendant *was a trustee at the time of the default*. An allegation that he has at all times been *president* of the corporation, although the president must be selected from the trustees, and is necessarily a trustee, is not sufficient as an allegation against him as trustee. The defendant must be sued as trustee, and not as president. (*Id.*)
 4. The assignee of the interest of a *cestui que trust*, under a transfer of all the property of a corporation to a trustee, in trust to sell the same and distribute the proceeds among certain *cestuis que trust*, including such assignor, is not precluded from recovering from such trustee, or the vendee to whom he has sold the property so transferred, the share of such assignor of the proceeds of such property, because the latter has not paid a promissory note given by him to such corporation as part of the consideration for the transfer of such property. (*Phelps* agt. *The Masterson, Smith & Sinclair Stone Dressing Co.* 3 Robt. 517.)
 5. The receiver of such corporation, to whom such note given by the *cestui que trust* on the transfer of their assets, has been passed, cannot recover upon such note, after he has sold the same at public auction to a *bona fide* purchaser. (*Id.*)
 6. Where two claimants for the same service apply for payment to the party bound to pay, and one of them is recognized as having a just claim, and is paid, to the exclusion of the other, who is, in fact, the one entitled, the party thus excluded derives no title against the party receiving payment, to the money paid. (*Patrick* agt. *Metcalfe*, 37 N. Y. R. 332.)
 7. The money thus paid is not an appro-
- priation for the payment of plaintiff's claim, and cannot be considered as a trust for such purpose. (*Id.*)
8. Where a trustee named in a will refuses or neglects to accept the trust and qualify for a period of twenty years, he must be deemed to have renounced the trust. (*In re Robinson*, 37 N. Y. R. 261.)
 9. A proceeding simply for the appointment of a trustee to execute trust duties and powers, is a matter within the discretion of the court, and it will direct to whom notice of such proceeding shall be given. (*Id.*)
 10. In such proceedings, the rule requiring the presence of all parties interested is one of convenience, subject to modification and discretion, and infant *cestuis que trust* may or may not be notified, as the court shall see proper to direct. (*Id.*)
 11. The relation existing between a director and the corporation is that of trustee. (*Butts* agt. *Wood*, 37 N. Y. R. 317.)
 12. Where a member of a board of directors of a plank road company, being also secretary of the board, presents to such board a bill for extra compensation as secretary, he is disqualified to act as director upon the auditing of such bill. (*Id.*)
 13. When such interested director must be included to constitute a quorum of the board, the board so constituted is not qualified to act upon such bill so as to bind the corporation. (*Id.*)
 14. When such board, acting under such circumstances, audits such bill, any stockholder may sue for himself, and any other stockholder who makes himself a party, to prevent the payment of said bill by the treasurer of the company. (*Id.*)

UNCONSTITUTIONAL ACT.

1. The office of commissioner of taxes of the city of New York, as at present constituted, comprises the official duties and functions of officers existing at the time the constitution was adopted; and the act of the legislature, vesting their appointment in the governor, with the advice and consent of the senate, is unconstitutional. (*The People* agt. *Raymond*, 37 N. Y. R. 428.)

UNDERTAKING.

19. Where a judgment of the court below

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on appeal is *affirmed* as to one defendant, and *reversed* as to the other defendant, not being *jointly* liable, the joint obligors who executed the *undertaking* given on the appeal for both defendants, are liable to pay the judgment of affirmance. It is a case of judgment affirmed in part and reversed in part. (*Affirming S. C. 17 How. 394, and Gardner agt. Barney, 24 How. 467.*) (*Seacord agt. Morgan, ante, 487.*)

2. The Code of Procedure does not provide for any other undertaking, in an action for the claim and delivery of personal property, than that to be taken and approved by the sheriff, however inadequate the amount for which it is given. (*DeRegnis agt. Lewis, 3 Robt. 708.*)
3. The defect of the want of a stamp, upon an undertaking, can be cured upon an exception to the undertaking. (*Id.*)
4. When a plaintiff commences an action without filing an undertaking required by law as a condition precedent to suing, the court may (under section 174 of the Code of Procedure) allow it to be filed *nunc pro tunc*. (*Millbank agt. Broadway Bank, 3 Abb. N. S. 223.*)

UNITED STATES STOCKS AND BONDS.

1. The provisions of the statutes of the United States, exempting from taxation under state or municipal authority the stocks issued by the United States government, are to be restricted in their application to the subject matter in hand. The general language thus used is to be applied only to the issues authorized by such acts. (*People ex rel. Broadway National Bank agt. Mayor, &c. of New York, 37 N. Y. R. 9.*)
2. A congressional declaration of exemption from taxation is of no force. The exemption is constitutional, and not legislative. Whatever subject is thus exempt is equally exempt if no declaration is made in the law authorizing its creation. If not exempt by virtue of the constitution, a congressional declaration cannot make it so. (*Id.*)
3. Certificates of indebtedness issued under the act of congress of March 1, 1862, are not exempt from taxation by state or municipal authority. They are not issued upon loans made to the government, but are acknowledgments merely of a pre-existing indebtedness. Neither are they to be deemed instrumentalities of the government, like ships of war or the mails, necessary to

carry on its business, and thus exempt from taxation. (*Id.*)

4. Whenever, by state law, a tax is laid upon property which consists of United States bonds exempt from taxation, then, in whatever form or in whatever terms the law is expressed, it is void, and cannot be enforced. (*Monroe Savings Bank agt. City of Rochester, 37 N. Y. R. 365.*)
5. But where the tax is declared in terms to be upon franchises and privileges granted to the corporation, it is not to be deemed void because such corporation employs the bonds, etc., of the United States as one of the means of accomplishing its purposes. (*Id.*)
6. Because a bank has, as a part of its franchise, the privilege of investing its money in United States bonds, it is not, therefore, to hold its franchise exempt from taxation. (*Id.*)
7. The state, in granting a franchise to a corporation, may limit the powers to be exercised under it, and annex conditions to its enjoyment, and require it to contribute to the resources of the state. (*Id.*)

USER.

1. The habitual use of a foot path across the lot of defendants for many years without objections, warrants the finding of a license from the defendants to cross said land by said foot path. (*Driscoll agt. Newark & Rosendale Lime and Cement Co. 37 N. Y. R. 637.*)
2. It is the duty of persons engaged in blasting to give notice to all persons about passing within the limits of possible danger, at the time of firing the blast; and omitting to do so, if persons passing are injured by the discharge, the question of negligence in omitting to give the notice is one for the jury, and their finding therein is conclusive. (*Id.*)

USURY

1. Where the discount of a draft is at a rate of interest allowed by law, it is not rendered usurious by any legitimate use which may afterward be made of the paper, nor by an acknowledged purpose of the bank, made at the time, of applying the paper to such future use. (*Farmers' and Mechanics' Bank agt. Parker. 37 N. Y. R. 148.*)
2. The lender is entitled to retain the discounted security in his own hands; or he may make any lawful disposition

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- of it which will tend to his advantage. (*Id.*)
3. If a bank in Ohio discounting paper can, by submitting to a re-discount in in this state, supply itself at once with current funds in New York at an expense equivalent to the mere costs of collecting the draft at maturity, such re-discount secured a legitimate benefit to the lender, without prejudice to the borrower. (*Id.*)
 4. The usury statute of Ohio is applicable only to banking corporations, and merely declares a forfeiture of the debt between the lender and borrower, without annulling the contract. (*Id.*)
 5. In respect to purchasers of commercial paper in good faith, under the laws of Ohio, it is no defense that the transaction between the original parties was usurious. (*Id.*)
 6. The question of usury is personal, and can only be raised by the parties to the transaction. (*Ohio and Mississippi R. Co. agt. Kasson*, 37 N. Y. R. 218.)
 7. When the maker of a renewal note interposes the defense of usury, there may be a recovery on the original note, if that was free from the taint of usury. (*Farmers' and Mechanics' Bank agt. Joslyn*, 37 N. Y. R. 353.)
 8. Where the maker of a promissory note pays a consideration to a party to indorse said note, and to procure a discount at the bank, such transaction does not constitute a usurious agreement. (*Chatham Bank agt. Betts*, 37 N. Y. R. 356.)
 9. The bank discounting such note in good faith can recover the same of the maker thereof. (*Id.*)
 10. What may have passed between the cashier of the plaintiff and the indorser and agent of the defendant, at the time the note was presented for discount, is not important. (*Id.*)
 11. Where a contract or obligation is given for two or more separate and independent things having no connection with each other, and one of those objects is the security of a usurious debt, although the contract is void and no action at law or in equity could be maintained thereon, nevertheless, if the party comes into a court of equity to ask that such contract be surrendered, all the statutes of usury have done affecting the complainant's right to relief is to forbid that any payment on account of such usurious debt shall be made a condition of relief. (*Williams agt. Fitzhugh*, 37 N. Y. R. 144.)
 12. When a mortgage has been given upon lands in Ohio to secure the payment of several promissory notes, a part of which notes are usurious, and a part of which are *bona fide*, although the mortgage is void, a court of equity will require the complainant to do equity by paying or tendering payment of the valid notes covered by the mortgage, before it will entertain a suit to cause the mortgage to be delivered up to be cancelled, as a cloud upon title, etc. (*Id.*)

VENDOR AND PURCHASER.

1. The acceptance of vouchers or certificates of a government officer for goods received for the use of government, of the same amount as the value of merchandise sold by vendors to persons in whose favor such vouchers are issued, under an agreement by the latter to deliver similar certificates to such amount, and a written receipt given by such vendors, expressly stating such receipt to be "in payment of bill of goods," will not so extinguish all claim for the price of such goods as to preclude the vendors from recovering so much thereof as shall be equal to any amount which government officers shall afterward legally deduct from the amount certified to in such vouchers, with the assent of such vendees. (*Wise agt. Chase*, 3 Robt. 35.)
2. A finding by a referee, in such case, that vouchers were not delivered in payment and satisfaction of the demands of the plaintiffs on account of the sale and delivery of the goods, is fully justified by the evidence. (*Id.*)
3. *Held*, that the government not having recognized the vouchers for the amount named therein, but only for about \$6,000, the defendants had not complied with their agreement to furnish vouchers for the amount of the plaintiffs' bill of goods. (*Id.*)
4. The selection by a purchaser of a particular carrier of the goods purchased, necessarily destroys all right on the part of the vendor to employ any other. (*Hills agt. Lynch*, 3 Robt. 42.)
5. The mere right of accepting or rejecting undelivered merchandise, and thus completing or repudiating a contract of purchase, is not a subject of levy or sale. (*Id.*)
6. Where goods purchased are directed by the purchaser to be delivered to a particular carrier for transportation, but by mistake of the cartman employed to cart them, and contrary to

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- his instructions, they are delivered to a different carrier, and while in possession of the latter are levied upon by the sheriff, under execution, against the purchasers, the goods will be regarded as being unlawfully in the possession of such carrier, when so seized; and the vendors may reclaim them, in order to forward them by the proper method of transmission, which can alone bind the purchasers. (*Id.*)
7. Such a delivery to the carrier is no more a delivery to the purchasers than a deposit of the goods with any other person, to be delivered to the purchasers. The carrier is at most the vendor's agent, and cannot refuse to re-deliver the goods to them on demand, at any time before they reach the purchaser's possession. (*Id.*)
 8. There is no principle which will convert a carrier, not only not selected by a purchaser, but entirely different from the one designated by him, into his agent, to accept the delivery of goods for him. (*Per ROBERTSON. Ch. J.*) (*Id.*)
 9. The obligee of a bond given for the purchase money of land (or his assignees), is entitled to recover, in an action on such bond, at least the excess of the amount due by its condition over the sum for which the obligee is liable on the covenants in his deed to the obligor, if no more. (*Cowdrey agt. Coit, 3 Robt. 210.*)
 10. If one in possession of premises under a deed with full covenants, upon a sale thereof under a prior mortgage becomes himself the purchaser, and assigns his bid to another, who obtains a deed of the premises from the sheriff, this is not such an eviction of the original grantee as is produced by the act of the law, or is the necessary and legitimate consequence of the existence of the mortgage foreclosed, and the action upon it, but is the result of the party's own voluntary sale of his interest acquired by bidding off the premises, and allowing his vendee to take the sheriff's deed. (*Id.*)
 11. Such sale of his interest in the land to another will not create anew a liability on the part of the obligee in the bond to refund the whole purchase money, by way of damages for breach of the covenants in his deed. (*Id.*)
 12. Where, upon a mutual contract, by which payment of the purchase money and conveyance of the premises are to be simultaneous, if an absolute and unconditional offer to pay, or to pay upon the execution of the deed described in the agreement, appears to have been made by the purchasers, they cannot recover back a deposit, part of the purchase money. (*The Congregation Shaaer Hashmon, 3 Robt. 386.*)
 13. In an action to recover the value of goods sold and delivered by the plaintiffs to the defendants, one of the defenses was that the sale was by samples, represented and warranted fair and correct; that the goods being inferior to the samples, the defendants returned them, and the plaintiffs accepted and disposed of them, without notice to the defendants. The terms of the sale, in respect to the warranty of quality, were quite uncertain, from the contradictory character of the evidence; one of the defendants testifying that the plaintiffs guaranteed the goods, and the plaintiff asserting the contrary. *Held*, that while the jury might have been justified in finding that it was a sale by sample, there being no such decisive evidence to that effect as would authorize the judge to give it to them as a conceded fact, or as a deduction of law, he properly left it to them to determine what was the intention of the parties in that respect. (*Stone agt. Browning, 49 Barb. 244.*)
 14. *Held, also*, that the jury having found that the defendants had no legal right to return the goods and rescind the sale, the latter were bound to pay the plaintiffs their commissions upon the resale for their account. (*Id.*)
 15. The plaintiffs, in their correspondence, asserted an absolute sale, and notified the defendants that they would treat the goods returned to them as upon consignment from the defendants, and apply the proceeds upon their (the plaintiffs') "lien" for the price. *Held*, that the word "lien" was not used in the technical sense, but was equivalent to "claim or demand" for the price; and was not inconsistent with an absolute or unconditional delivery, so as to let in a defense under the statute of frauds. (*Id.*)
 16. *Held, further*, that the defendants were entitled to have the damages assessed at the market rates prevailing when the goods were returned, or the breach occurred; but that, if the damages would then have been much larger in amount, so that they in fact sustained no injury by such delay, nor by a sale upon credit, they had no right to complain. (*Id.*)
 17. A liquor merchant in Syracuse, in former good standing with the plaintiffs' firm in New York, gave a verbal order to the plaintiffs for a bill of goods

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on credit, which were sent to him by railroad and left in a storehouse at Syracuse. The merchant was in fact insolvent, and became fully aware of it before he paid the freight and took the goods into his custody. *Held*, that the judge properly instructed the jury that it would be a fraud upon the plaintiffs, sufficient to avoid the sale, if they believed, upon the evidence, that the purchaser received the goods with a preconceived design not to pay for them, although he had no such design when he gave the order. (*Pike* agt. *Wieling*, 49 Barb. 314.)

18. *Held*, also, that the receipt by mail of the bill of goods by the purchaser, containing the terms of sale, would not take the contract out of the statute of frauds, but either party might repudiate it at any time before the actual receipt and acceptance of the goods by the purchaser. (*Id.*)

19. The refusal of purchasers either to pay the money, give security, or do any other act in fulfillment of the contract, gives to the vendors the right to sell the property on the purchasers' account, and to hold them responsible for a deficit in the price. (*Lewis* agt. *Greider*, 49 Barb. 606.)

20. It is not necessary, in such a case, for the vendors to give the vendees notice either of the time or place of sale. General notice of their intention to sell is sufficient. (*Id.*)

21. The law, in such a case, constitutes the vendor in possession of the goods the agent of the vendee, for the purpose of such sale. As such agent, he must act in good faith, and take proper measures to secure as fair and favorable a sale as possible. (*Id.*)

22. Vendors are not restricted, under such circumstances, as respects the place of sale, to the place of delivery of the property named in the contract, nor to a time, necessary for reasonable notice, after the right to sell accrues; but if the property cannot readily be sold at the place of delivery fixed by the contract, or a better and more advantageous sale can be effected elsewhere, it is the duty of the vendor to go where he can get the best price and readiest sale, not out of the usual course and channels of trade, in marketing such property. Such sale should be within a reasonable time. (*Id.*)

23. The presumption is that a referee did not overlook the terms of a memorandum of sale, or fail to consider it as it stood at the time of the trial, in weighing the evidence upon a disputed ques-

tion of fact. It is for the party complaining of the report to show clearly that such a mistake has occurred, before he can ask the court to act upon it. (*Id.*)

VERDICT.

1. A verdict and judgment, in form as if the action were on the case, are wholly unwarranted in an action for the claim and delivery of personal property. (*Wheeler* agt. *Allen*, 49 Barb. 460.)

WARRANTS.

1. A warranty given on the sale of a promissory note made by O., that "the note is the genuine note of O.," is not shown to be broken by proof that O. was an infant when the note was made and became payable; and the finding of the referee that the defendant "agreed that the note was a genuine note, and not otherwise," forbids the implication of any other warranty. Such a warranty affirms nothing respecting the validity of the note as a binding obligation. (*Baldwin* agt. *Van Deusen*, 37 N. Y. R. 487.)
2. When an answer alleges a fraudulent sale of a note, with a representation that the note was good as a defense to an action for the consideration, it is not sufficient to prove that the note of an infant, which was the subject of transfer, was warranted to be genuine; and if no fraud in the sale and transfer is proved, no defense is established. (*Id.*)
3. A note made by an infant may form a sufficient consideration to sustain another note given for the purchase of the same. (*Id.*)
4. When the order of the supreme court reversing a judgment fails to show that the judgment was reversed upon questions of fact, it must be assumed to have been upon questions of law, arising upon exceptions taken at the trial. (*Id.*)

WARRANTY.

1. Where there is a general warranty of the quality of an article, express or implied, the rule of damage for the breach of such warranty is the difference between the value of the article, if it had corresponded with the warranty, and its actual value. (*Hoe* agt. *Sanborn*, ante, 197.)
2. Where there has been no disaffirmance of the contract by the purchaser of a

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warranted article, which he retains, and he is sued for the price, he can only *recoupe* his damages for the breach of the warranty; and in estimating such damages, the vendor should be allowed the actual value of the article. (*Id.*)

3. Where an article sold by an auctioneer was called by him "*blue vitriol*," which was open to inspection, but evidently was so termed as being its commercial designation, or as being a vitriol of a blue color (which it was), in either case there was no warranty of anything, even though the auctioneer stated that the article "was sound and in good order," and the article in fact was an inferior article of blue vitriol. (*Hawkins* agt. *Pemberton*, ante, 376.)
4. The term "sound" applies to condition only, not to quality or kind, and is opposed to defective, decaying or injured. The article sold was evidently sound as inferior blue vitriol, and there being no question but what it was in good order, there was no deception practiced upon the purchaser, although he alleged that he purchased it under the representations of the auctioneer as merchantable blue vitriol. (*Id.*)

WHARVES AND PIERS.

1. The lessees of the wharfage of a public pier from the corporation of the city of New York, where in the lease is assigned the wharfage which shall or may arise or accrue during the time covered by the lease, the lessees agreeing to keep the premises in repair, are liable for an injury arising during the lease, by which a horse is backed off the pier and drowned, in consequence of neglect to keep the string pieces thereon in proper repair. (*Radway* agt. *Briggs*, ante, 422.)
2. It was error for the court below to *non-suit* the plaintiffs, on the ground that they had not shown that the defendants (the lessees) were in possession, under their lease, of the premises in question, at the time of the injury. (*Id.*)
3. The naked right to collect wharfage, which was all that the defendants possessed in this case, is incorporeal in its nature, and is incapable of any other or different possession than grows out of the right itself, and is incident thereto, and which attached by force of the agreement which originated it immediately on its execution and delivery. (*Id.*)
4. The defendants were not entitled to the exclusive physical possession of the pier by the terms of their lease; neither was it in the power of the corporation to grant it to them. A public pier is a part of the public highway, and must be devoted to the public use. (*Id.*)
5. Under the Revised Laws of 1813 (ch. 86, § 212, wharfage is only demandable for the use of the wharf or pier; and payment of wharfage by any ship or vessel is required only in case the same is made fast to the wharf, or to another ship or vessel already fastened thereto. (*Taylor* agt. *Atlantic Mutual Ins. Co.* 37 N. Y. R. 275.)
6. The lessees of public wharves or piers in New York are entitled to no compensation for passing over such wharves as a common highway of the city; upon the principle that wharves and piers are streets of the city, for the free passage of all citizens. (*Id.*)
7. Query, whether the owners of a ship or vessel sunken in navigable public waters owe any duty to the public to remove such impediment to navigation? (*Per DAVIES, Ch. J.*) (*Id.*)
8. The right to collect wharfage by the corporation of New York city carries with it the correlative duty of keeping the wharves in repair, and the legal transfer of this right to another party subrogates such party to the performance of such duty. (*Radway* agt. *Briggs*, 37 N. Y. R. 256.)
9. Where the corporation had transferred by lease to defendant the right to collect wharfage, for the period of five years, the lessee to keep the wharf in repair during the time, *held*, that defendant was liable for all damages resulting, etc., from a neglect to keep such wharf in repair. (*Id.*)
10. *Held*, defendant liable for the value of a horse, cart and load of merchandise, which, for want of a suitable guard, had been lost by backing off the wharf into the river. (*Id.*)
11. A lease of a wharf is merely a letting of the franchise of wharfage. No property in or right to the wharf itself passes to the lessee. There cannot, therefore, be a *possessio pedis*, as in the case of real property. (*Taylor* agt. *Beebe*, 3 Robt. 262.)
12. In an action by one claiming to be the lessee of a wharf, to recover wharfage, the burden of proof is on the plaintiff. Unless he shows a proper lease of the wharf to him, he fails to establish any right to collect wharfage of the defendants. (*Id.*)
13. Where public wharf, leased by the comptroller of the city of New York, is

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- not let by public auction, as required by law, the lessee acquires no right, under the lease, to collect the wharfage. (*Id.*)
14. In an action by the plaintiff, the owner of a wharf or dock at the foot of Sedgwick street, Brooklyn, to recover a sum claimed to be due from the defendant for wharfage, the defendant attempted to show the wharf or pier to be within the county of New York, inferentially, from the following statutes and facts, viz: The county of Kings is bounded northerly by the county of New York; the county of New York contains all the land under water to low water mark on Long Island; the statute (*Laws of 1836, ch. 484, § 2*), makes the bulkhead line to be located in pursuance of its provisions the permanent water line of the city of Brooklyn, and prohibits the extension of any bulkhead into the East river beyond such line. In 1857, the legislature established a bulkhead line, or line of solid filling, and prohibited the filling in with solid material in the waters of the port beyond such bulkhead line. The evidence did not show where the line of low water mark was, or the bulkhead line established by law. There was a bulkhead at the foot of Sedgwick street, and the wharf or pier in question extended 450 feet into the water beyond; but it was not shown that such bulkhead extended to the line established by law. *Held*, that it could not be assumed that the law prohibiting the erection of a wharf or pier of solid material in the water outside of a certain line had been violated. That there was no necessary sequence, from the statutes referred to, or the evidence in the case, that the premises were not in the city of Brooklyn. (*Kelsey agt. Murray, 49 Barb. 231.*)
 15. *Held, also*, that the lessees of the plaintiff having been dispossessed of the premises, under summary proceedings instituted by the plaintiff before the city judge of Brooklyn, for non-payment of rent, and the judgment of dispossession having been affirmed by the supreme court, on *certiorari*, such judgment and affirmance were a conclusive bar to any claim to the wharfage by the lessees of the plaintiff. (*Id.*)
 2. The doctrine of inofficious testaments, invoked from the civilians, has no place in our law. (*Id.*)
 3. Where the evidence established most clearly and satisfactorily that the decedent, at the time of making his will, had *full testamentary capacity* to make his will, and acted of his own *free, uninfluenced will and wishes* in making, executing and declaring it, the fact that he gave only a small portion of his large estate to his only son and only child, and a small legacy to a sister, and the remainder and large bulk of his estate absolutely to his brother—these three persons constituting his only near relatives—could have no effect upon the validity of the will. (*Id.*)
 4. A testator devised to his wife and daughter, each, the equal one-half part of his estate, real and personal, share and share alike, subject to these restrictions, viz. that each of the devisees was vested with a power of testamentary disposition, unaffected by any trust or limitation; but in case of the death, *intestate and without issue*, of either devisee, whatever might remain of the said property, was devised to the survivor. *Held*, that each devisee might, during her lifetime, dispose of the entire fee of the estate devised to her, for her own benefit; and that the devisees having united in a conveyance to a purchaser, of the premises, with covenant of warranty, such conveyance passed all the title of the grantors, either vested or contingent; that such title was good, and the purchaser in equity was bound to accept it. (*Freeborn agt. Wagner, 49 Barb. 43.*)
 5. *Held, also*, that any execution of the power of testamentary disposition, made after the execution of the said conveyance could have no manner of effect upon the estate thereby conveyed. (*Id.*)
 6. A will contained substantially the following provisions: "After all my lawful debts are paid and discharged, I give and bequeath unto my executor hereinafter appointed, all my estate, real and personal, &c., in *trust*, for the following uses and purposes, viz; I direct my executor to pay and apply the whole net income of my estate to the use and support of my mother and wife during the life of my mother, and to permit my wife and mother to use and occupy my farm as their home during the life of my mother. On the death of my mother, I order and direct my executor to pay certain legacies amounting to \$5,300. "Fifth. I do give, devise and bequeath all the rest,

WILL.

1. A man has a right to make whatever disposition of his property he chooses, however absurd or unjust. If capacity, formal execution and volition appear, his *will* must stand. (*Sequins agt. Sequins, ante, 336.*)

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- residue and remainder of my said estate to my wife, and to her heirs and assigns forever, which is to be accepted and received in lieu of all dower and right of dower, and I do hereby authorize and empower my said executor to sell and convey my real estate, at any time after the death of my said mother, and to pay over the proceeds thereof to my said wife," *Held*, 1. That the trust created by the will did not comprehend the payment of the testator's debts. 2. That when the purpose for which the trust was created ceased, by the death of the testator's mother, and the payment of the legacies, the estate of the trustee ceased also. 3. That the power given by the fifth clause of the will to the executor to sell, unaccompanied by any trust, except to pay over the proceeds to the wife, could not be upheld upon any application of the principle of equitable conversion; that doctrine never being applied or enforced to defeat, but always to uphold and preserve, estates. 4. That such power was a general power in trust, and was repugnant to the direct and absolute devise to the wife. And that she having remained in possession after the death of the testator; and being in actual possession, claiming under the devise to her, when a conveyance of the premises was made by the executor, in assumed execution of such power; and constantly asserting her title as owner in fee; the principle of the general rule that a power shall not be exercised in derogation of a prior grant by the appointor applied, notwithstanding the devise and power took effect the same instant. 5. That the power to sell, in the fifth clause, had no connection with the devise in the first clause; the latter being a trust, while the former required the proceeds to be paid to the wife, which would be in direct contravention of the trust. 6. That the object of the testator was, (1.) To have his debts immediately paid out of his personalty, and his farm kept for the use of his mother and wife. (2.) To have the objects of the trust fulfilled; after which, (3.) To give the residue of the property to his wife. And that the power of sale could not be allowed to operate to defeat this intention of the testator. 7. That the object of the power was not a lawful one. (*Quia* agt. *Skinner*, 49 Barb. 128.)
7. Accordingly *held*, that a conveyance of a portion of the real estate of the testator, executed by the executor and trustee, to a third person, did not operate to defeat the estate of the wife in the premises. (*Id.*)
8. To constitute a valid publication of a will or codicil, the testator must, in the presence of two witnesses, declare the instrument to be his last will and testament, or a codicil thereto. If the proof fails to establish such a declaration, to one of the subscribing witnesses, the instrument should not be admitted to probate. (*Abbey* agt. *Christy*, 49 Barb. 276.)
9. Where one of the attesting witnesses testified that on entering the testator's room, the latter, taking a paper out of his portfolio, desired the witness to read it, which he did, silently; after which the testator requested him to witness his signature; in answer to a question put by the witness whether he had read the paper produced, the testator said he had heard it read; and being asked if it was all right, he replied "I think so;" and the other witness testified that when they entered the room the testator remarked that he wanted them to "witness his signature;" that they then put their names to the paper as witnesses; but that "nothing was said whatever regarding what the paper was, or anything about it," that the witness never read it, and did not know what it was: *Held* that this was not a sufficient publication. (*Id.*)
10. Of the effect of an attestation clause, as evidence of the due execution of a will. (*Id.*)
11. A testatrix having in her possession, belonging to her, four trunks filled with wearing apparel, &c. and a tin box containing some articles of jewelry, &c.; a leather traveling valise containing jewelry belonging to herself, as well as personal ornaments belonging to her deceased husband in his lifetime, and owning no other trunks containing wearing apparel, silver or jewelry, executed a will. By that will she bequeathed to the plaintiff "all her wearing apparel, household linen and stuff and jewelry not" thereafter specifically bequeathed, which "was then contained in eight trunks, together with the said trunks." &c. She bequeathed one half part of all her residuary estate to a friend, and the other half to the two children of her sister's husband. The testatrix, until the time of her death, remained in possession of the four trunks, with the tin box, and their contents, and continued to own the valise with its contents; and did not then own any other trunk containing wearing apparel, household linens, stuffs, or silver or jewelry. The residuary legatees claimed the contents of the valise,

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under the general residuary bequest. *Held*, that the plaintiff was entitled to the articles of jewelry belonging to the testatrix contained in the valise, under the bequest to her in the will, because she would have had no jewelry in a trunk unless the valise were one. (*McCoy* agt. *Vulte*, 3 *Robt.* 490.)

12. When the whole of a description does not correspond with any existing subject, but a part does, the residue of it beyond such part may be disregarded as erroneous and surplusage. (*Id.*)

13. The testator gave certain property to his daughter, Mrs. Prowitt, during her life, and after her death "to such children as should be living at the time of her death." *Held*, under the circumstances of the case, that this expression was not limited in its effect to the immediate offspring of Mrs. Prowitt, but included remoter descendants, as grandchildren. (*Prowitt* agt. *Rodman*, 37 *N. Y. R.* 42.)

14. The expression "children then living," may mean "lawful issue," or remoter descendants, if such was the intention of the testator, to be gathered from other parts of his will. In the case of a contingent future gift to the children of a first taker, followed by a limitation over for want of such, the presumption is in favor of the first taker's posterity to his remoter descendants, in preference to the donee over. (*Id.*)

WITNESS.

1. In an action for damages for criminal conversation by the defendant with the plaintiff's wife, the wife cannot be a witness against her husband. (*Hicks* agt. *Bradner*, ante, 118.)

2. A party is not permitted to assert, or to present evidence to show, that one state of facts is true, and afterwards to assert or prove to the court that his prior evidence was untrue, or not to be relied on. But where a witness has given evidence against the side for the support of which he has been called, and the court can perceive good grounds for apprehending that the witness has testified under a mistake of the facts, or intentionally falsely, and there is no bad faith on the part of the party producing the witness, he is allowed to give evidence explaining, or even contradicting, his own witness. (*People* agt. *Skeehan*, 49 *Barb.* 217.)

3. A judge, at the trial, may permit counsel to ask a party examined as a wit-

ness, on his cross-examination, if he has not sworn falsely in a particular suit, or on some specified occasion; for that would be an act of himself which, if he admitted, he might possibly explain. But a judge has not the discretion to permit the other party to affect the credit of the witness, as such, by proof by him, on his cross-examination, that third persons have accused him of swearing falsely; that being mere hearsay evidence, and not proof of acts or declarations of the witness for which he is personally responsible. (*Hannah* agt. *McKellip*, 49 *Barb.* 342.)

4. Where a witness' character for truth and veracity is attacked by asking him, on cross-examination, whether third persons have not accused him of swearing falsely, evidence showing that his general character for truth and integrity is and always has been good, is not admissible. (*Id.*)

5. The fact that the witness has not sued such third persons for slander will not make the specific slanderous accusations made by them admissible to affect his credit. (*Id.*)

6. The positive testimony of an unimpeached, uncontradicted witness, cannot be discredited or disregarded, arbitrarily or capriciously, by court or jury. (*Seibert* agt. *The Erie Railway Co.* 49 *Barb.* 583.)

7. Although it belongs to a jury, in considering the weight of evidence, to pass upon the credit due to the respective witnesses, this does not imply that they may, without reasonable or justifiable ground, disbelieve any witness. They have no right to discredit an unimpeached, uncontradicted witness, who testifies fairly, and gives clear, rational, consistent and relevant testimony. (*Id.*)

8. For judicial purposes, all witnesses stand upon a par, and must be believed in their testimony, unless discredited by the inconsistency, incredibility or improbabilities of their statements, on cross-examination, or otherwise contradicted by other witnesses, or impeached in respect to their general character for integrity or truth. (*Id.*)

9. A witness who stated that he had been in business for many years as a manufacturer of saws and blacksmith, and that he was familiar with the material and quality of saws, *held*, presumptively competent to give an opinion of the weight of saws in question, and the value of their material. (*Hae* agt. *Sandborn*, 3 *Abb. N. S.* 189.)

10. A party to an action, as well as any

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other witness, may be compelled to make an affidavit, under subdivision 7 section 401 of the Code of Procedure. (*Fisk agt. Chicago, etc. R. R. Co. 3 Abb. N. S. 430.*)

11. A "fishing" examination is not allowable under that section. An order for the examination can only be made upon proof that the affidavit of the witness is "necessary;" and to allege this involves knowledge in advance of the facts to which the witness will testify. (*Id.*)
12. The proper course, when an affidavit is desired, is, ordinarily, to draft an affidavit and submit it to the witness to be verified, before applying for an order. (*Id.*)
13. But the objection that no affidavit has been prepared and submitted may be waived; and it is waived if, when asked to make affidavit, the witness does not require a draft to be submitted, but makes a general refusal to testify. (*Id.*)
14. After a witness has refused to make affidavit, and an examination has been ordered, the court should not arrest it upon the ground that an affidavit has subsequently been tendered, unless it very clearly appears that such affidavit is full and frank. (*Id.*)
15. No examination of books and papers is allowable, in the proceeding authorized by subdivision 7 of section 401 of the Code. (*Id.*)

WRIT OF ASSISTANCE.

1. The general rule is that, when a judgment, order or decree has been reversed or vacated, restitution will be made of all property and rights which have been lost by reason of it. (*Chamberlain agt. Choles, 3 Abb. N. S. 118.*)
2. The case of vacating a writ of assistance forms no exception to this rule. The order which vacated it should make provision for reinstating any one who may have been dispossessed under the vacated writ, whether such party shows title to the possession or not. (*Id.*)

WRIT OF PROHIBITION.

1. The court will not issue a writ of prohibition to restrain a magistrate from entertaining a summary proceeding to remove a tenant, merely because the tenant has a clear defense to the proceeding. (*People ex rel. Bean agt. Russell, 3 Abb. N. S. 232.*)
2. If the magistrate has jurisdiction of the proceeding, he must be allowed to hear and decide it. If he decides erroneously upon the merits, the remedy is by *certiorari*, or action for damages. (*Id.*)
3. The presumption of law is that a judicial officer will decide a question submitted to him correctly. (*Id.*)

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COURT OF APPEALS.

DECISIONS RENDERED JUNE, 1868.

Judgments affirmed with costs.

Edgar Schemerhorn, appellant, rgt. Hudson River Railroad Company, respondents. James K. Place and another, appellants, agt. William S. Ilvaine and another, impleaded, &c., respondents.

Betsey Edwards, survivor, &c., respondent, agt. Ebenezer Preston and others, surviving executors, &c., appellants.

Martha Ernst, executrix, &c., respondent, agt. Hudson River Railroad Company, appellants. (32 *How.* 61, 262; 24 *Id.* 97; 19 *Id.* 205; 32 *Barb.* 159.)

Lydia Fox, administratrix, &c., respondent, agt. Zepporah O'Hara, administratrix, &c., appellant.

Thomas V. Porter and another, respondents, agt. William Spence, appellant.

Samuel T. Champney, administrator, &c., app't, agt. Fidelia Blanchard, resp.

William M. Gregg, respondent, agt. Peter Pierce, appellant.

Mortimer Porter, respondent, agt. Elisha Ruckman, appellant.

Robert H. McKibben, respondent, agt. Horation N. Peck, appellant.

William Brown, appellant, agt. Jacob Weber, jr., respondent. (24 *How.* 306.)

James DeP. Ogden and another, appellants, agt. D. Colden Murray, receiver, &c., respondent.

Charles G. Till, respondent, agt. George H. Beyer, appellant.

William P. Van Rensselaer, respondent, agt. William Barringer, appellant; also same agt. DeGraff (2), Hauer Dietz, Wheeler (2).

Jonas Bartlett and another, appellants, agt. Charles Robinson, respondent. (9 *Bosw.* 305.)

Joseph F. Huntington, appellant, agt. Horace B. Clafin and others, respondents (10 *Bosw.* 262.)

James R. Whiting, respondent, agt. The Mayor, &c., appellants.

Lydia Newkirk, administratrix, &c., appellant, agt. The New York and Harlem Railroad Company.

Frederick O. Richtmeyer, assignee, &c., respondent, agt. George Remsen, sheriff, &c., appellant.

John C. Winne and another, survivors, &c., appellants, agt. John Childs, Francis McDonald and others, respondents.

The People ex rel. Livermore, respondent, agt. Alexander Hamilton, jr., appellant. (15 *Abb.* 328.)

Joseph Hoxie, appellant, agt. Daniel B. Allen, respondent.

Daniel McCabe, appellant, agt. William P. Brayton, late sheriff, &c., and another, respondent.

Gideon Fountain, respondent' agt. Daniel L. Pettee, appellant.

The Mayor, &c., resp., agt. The Hamilton Fire Insurance Company, app'lts.

Theo. T. Edgerton, respondent, agt. The New York and Harlem Railroad Company, appellants. (35 *Barb.* 193, 389.)



Decisions Court Appeals.

Catharine Hinneman and another, administratrix, &c., appellants, agt. Samuel Rosenback, respondent.

Smith Kellogg, resp., agt. John M. Adams and others, impleaded, &c., app'ls

John Wolf, respondent, agt. The Security Insurance Company, appellants.

Hiram Curties, respondent, agt. Theodore P. Howell, appellant.

Henry R. Hosford, respondent, agt. Benj. Ballard, appellant.

The Hatters Bank, respondent, agt. John D. Phillips and others, appellants.

John P. Sanderson, appellant, agt. Thos. C. Morgan et al., respondents.

Alexander Gillespie et al., appellants, agt. Alexander Carpentier, respondent. (25 *How.* 203; 1 *Robt.* 65.)

Stephen LeRoy and others, respondents, agt. The Park Fire Insurance Company, appellants.

Henry S. Redfield and another, administrator, &c., and another, respondents, agt. George Tegg, appellant.

John Hardman and another, appellants, agt. John B. Bowen, respondent.

Frederick E. Giebert, appellant, agt. Alois Peteler and others, respondents. (33 *Barb.* 488.)

Samuel N. Pike and another, resps., agt. Samuel A. Hetfield and another, app'ls.

Charles H. Baker, respondent, agt. Joseph A. Bliss and others, appellants.

Judgments reversed and new trial ordered, costs to abide event.

Lewis C. Taylor, appellant, agt. Henry M. Bradley, respondent.

James S. Sandford et al., resps., agt. Elihu Ruckman, app'lt. (24 *How.* 521.)

James Cassin, respondent, agt. Lawrence Delaney and wife, appellants.

Peter Flora, appellant, agt. Peter Carbeau, jr., respondent.

Seth B. Grosvenor, respondent, agt. The New York Central R. R. Co., appellants.

Stephen LeRoy et al., resps., agt. The Market Fire Insurance Co., app'ls.

Joseph Fellows, trustee, &c., app'lt, agt. Lewis Northrop et al., resps.

Thomas B. Watson and another, respondents, agt. Anthony F. Campbell, sheriff, &c., appellant.

Judgement affirmed, and the supreme court directed to fix anew the time for carrying the sentence into effect.

John Kennedy, plaintiff in error, agt. The Peo le, &c., defendants in error.

Order of general term reversed, and judgment on report of referee affirmed with costs.

Philip Case, appellant, agt. Elbridge G. Phelps and others, respondents.

Isaac G. Belloni, appellant, agt. Robert Belloni and others, respondents.

Order of general term reversed, and order of special term affirmed, with costs.

In the matter of the lien of Freeman Bird and another, respondents, agt. The Steamboat Josephine, appellants. (50 *Barb.* 501.)

George Roberts, respondent, agt. John W. Carter and another, appellants. (24 *How.* 44; 17 *Id.* 479, 524; 28 *Barb.* 462; 9 *Abb.* 366.)

Order appealed from, affirmed with costs.

William A. Morris and another, executors, &c., respondents, agt. Henry H. Morange, impleaded, &c., appellant. (32 *How.* 178; 26 *Id.* 247; 20 *Id.* 257; 34 *Barb.* 361; 32 *Id.* 650; 17 *Abb.* 86; 12 *Id.* 164.)

Order appealed from, reversed with costs.

In re Peter Townsend; in re Peter Townsend and another.

Decisions Court Appeals.

Judgment reversed, and new trial ordered.

Maurice Lanergan, plaintiff in error, agt. The People, &c., defendants in error. (34 How. 390; 50 Barb. 256.)

Judgment reversed without costs, judgment to be settled by Judge WOODRUFF, and new reference to be had.

Noah Worrell, appellant, agt. David Munn and others, respondents.

Judgment reversed, assessors directed to deduct \$291,128.26 from the relator's assessment.

The People, &c., ex rel. The Citizens' Gas Light Co., appellants, agt. The Board of Assessors of the city of Brooklyn.

Order of general term affirmed with costs, and judgment absolute for plaintiffs with costs.

Edwin K. Scranton and another, respondents, agt. Alva Clark, appellant.

Lewis Johnson and others, resp'ts, agt. Myron H. Clark and another, app'lts.

Order of general term affirmed with costs, and judgment absolute for the defendants with costs.

William Coleman and another, appellants agt. The Second Avenue Railroad Company, respondents. (48 Barb. 376.)

Judgment of the general term and of the surrogate reversed, and new trial before the surrogate ordered, without costs on appeal.

Moses S. W. Jackson, minor, &c., app'lt, agt. Anna Margaret Jackson, resp't.

Reargument ordered,

Lucy A. Warner, administratrix, &c., resp't, agt. Erie Railway Company, app'lt.

Judgments of special and general terms reversed and judgment ordered removing the respondents (except Hugh O'Brien) from the office of councilmen of the city of New York, and declaring the appellants entitled to those offices with costs. As to Hugh O'Brien judgment affirmed with costs.

The People of the State of New York, appellants, agt. Hugh O'Brien, Cornelius F'yun et al., respondents.

Judgment reversed, and judgments ordered for the appellant with costs (and in case No. 2 for the two penalties claimed.

The Metropolitan Board of Health, appellants, agt. Jacob Heister respondent (two cases).

Jacob Heister, respondent, agt. The Metropolitan Board of Health, appellants (two cases).

DECISIONS RENDERED SEPTEMBER, 1868.

Judgment affirmed with costs.

Joshua P. Blanchard, appellant, agt. Hiram P. Trim, respondent.

Samuel J. Hunt, appellant, agt. James Cunningham et al., respondents.

Nancy Frank, administratrix, &c., respondent, agt. Giles Harrington, appellant.

William J. Blydenburgh, executor, &c., respondent, agt. George G. Johnson, impleaded, appellants.

William J. Blydenburgh, executor, &c., appellant, agt. Amos T. Bingham et al., respondents.

Decisions Court Appeals.

Henry Von Schaick, executor, &c., respondent, agt. The Third Avenue Railroad Company, appellants.
George Juliand, respondent, agt. Peter Rathbone and Lucius F. Darby, appellants.
James Heney et al., appellants, agt. The Trustees, &c., of the Brooklyn Benevolent Society et al., respondents.
Gerothman W. Cornell, sheriff, &c., resp't, agt. James F. Dakin, app'lt.
Alfred Webster, resp't, agt. The Hudson River Railroad Company, app'lts.
Henry C. Fox, app'lt, agt. Gustavus A. Rollins, impleaded, &c., et al., resp'ts.
Stephen Bowman, resp't, agt. Gerothman W. Cornell, sheriff, &c., app'lt.
George W. Dickson, an infant, by guardian, resp't, agt. Luther J. McCoy, app'lt.
William Wheeler, appellant, agt. Edwin A. Billings, respondent.
Solomon Keller and William J. Lyon, app'lts, agt. Henry J. Phillips, resp't.
Harriet Ostrander, respondent, agt. Abiram Fellows, appellant.
Austin Sherman, appellant, agt. Michael McKeon, respondent.
Charles Neg, respondent, agt. Obadiah Newton, appellant.
William Carroll, resp't, agt. The Charter Oak Insurance Company, app'lts.
Eleanor Thurston, respondent, agt. Henry C. Cornell et al., appellants.
Junius H. Hatch, respondent, agt. The City of Buffalo, appellants.
Lewis F. Allen et al., respondents, agt. The City of Buffalo, appellants.
The Mayor, &c., of New York, app'lts, agt. Henry Erben and the New York Life Insurance and Trust Co., resp'ts.
George Hurst and James Coburn, resp'ts, agt. Elisha C. Litchfield, app'lts.
Donald Kennedy, respondent, agt. Albert H. Goss, appellant.
William Loback and John F. Schepeler, resp'ts, agt. George Hotchkiss, app'lt.
The Buffalo and Alleghany Railroad Company, app'lts, agt. Isaac Brayton, resp't.
Stephen W. Patch, respondent, agt. John B. Roe, appellant.
George Clark, resp't, agt. George Tunnicliff and Henry H. Rathbun, app'lts.
John E. Stone, resp't, agt. The Western Transportation Co., app'lts.
Abram Fitch and Prosser Jones, app'lts, agt. Adrastus Snedecker, resp't.
William H. Shumway, et al., impleaded, &c., app'lts, agt. Thomas D. Green, resp't.
Charles Durand and others, resp'ts, agt. William H. Hankerson, impleaded with James Arnold, et al., app'lts.
Samuel E. Howard et al., resp'ts, agt. William H. Hankerson, impleaded, &c., app'lts.
George W. Grant, assignee of Ambrose W. Barnes, resp't, agt. Sanford P. Chapman, sheriff, &c., app'lt.
Patrick Kelly, resp't, agt. The Indemnity Fire Insurance Co., app'lts.

Order of general term affirmed, and judgment absolute for respondents, with costs.

Isabella Draper, resp't, agt. Irene Stouvenel, executrix, &c., of Joseph Stouvenel, app'lt.
John E. Speights and John G. Dudley, executors, &c., respondents, agt. J. Dean Hawley.
Benjamin G. Hitchings, app'lt, agt. Ellen Van Brunt, administratrix, &c., of John H. Hubbard, resp't.
William Allgeo, appellant, agt. William E. Duncan, respondent.
The Winsted Bank, resp't, agt. Archibald Webb et al., app'lts.
William P. Angel, resp't, agt. Harriet Hollister, executrix, &c., app'lt.

Reargument ordered

John Beisiegel, resp't, agt. The New York Central Railroad Co., app'lts.
Abram M. Benton, respondent, agt. Stanley Martin, appellant.

Decisions Court Appeals.

Abram J. Van Allen, appellant, agt. Wm. Wait, respondent.
 Wessel B. Westbrook, respondent, agt. Seth Wiley, appellant.
 Averill N. Grippin and Amasa L. Leversee, administrators, &c., resp'ts, agt. The New York Central Railroad Co., app'lts.
 Charlotte E. King, executrix, &c., resp't, agt. Charles N. Talbot and David W. Oliphant, app'lts.
 Anna King, resp't, agt. Charles N. Talbot and David W. Oliphant, app'lts.
 Arthur King, resp't, agt. Charles N. Talbot and David W. Oliphant, app'lts.
 Henry Hart, administrator, &c., app'lt, agt. The Erie Railway Co., resp'ts.
 John Ely, resp't, agt. Paul Spofford and Thomas Tileston, app'lts.
 David O. Nichols, by Joseph C. Howe, his guardian, resp't, agt. The Sixth Avenue Railroad Co., app'lts.
 Erastus Corning and John F. Winslow, respondents, agt. The Troy Iron and Nail Factory.
 Charles Leonard and Burr Burton, resp'ts, agt. The New York, Albany and Buffalo Electro Magnetic Telegraph Co., app'lts.
 William W. Ballard and Joseph C. Sampson, resp'ts, agt. Richard Burgett, app'lt.
 James Calkins and Henry W. Grannis, app'lts, agt. James M. Smith, resp't.

Judgment reversed and new trial ordered, costs to abide the event.

Fanny Wilcox, administratrix, &c., of John Wilcox, resp't, agt. The Rome, Watertown and Ogdensburgh Railroad Co., app'ts.
 Samuel Pindar, assignee, &c., resp't, agt. The Continental Fire Insurance Co. of New York city app'lts.
 Samuel Pindar, assignee, &c., resp't, agt. The Resolute Fire Insurance Co., app'lts.
 The International Bank, resp'ts, agt. William Monteath, app'lt.
 Isaac Snyder, resp't, agt. William H. Trumpbour et al., app'lts.
 Conrad A. Crounse and William Crounse, resp'ts, agt. Ebenezer A. Fitch, impleaded, &c., app'lts.
 Stephen LeRoy et al., resp'ts, agt. The Northwestern Insurance Co., app'lts.
 Jacob Wiles, respondent, agt. George Lintner, appellant.
 George W. Card, appellant, agt. John H. Card et al., respondents.
 George P. Bradford et al., app'lts, agt. Lydia Fox, executrix, resp't.
 Henriette Maille, respondent, agt. Samuel Lord et al., appellants.
 Charles Starbird, app'lt, agt. Samuel H. Barrows, Edward Kirk and Nathaniel Laird, resp't.
 James W. Van Alstyne et al., resp'ts, agt. The National Commercial Bank of Albany, app'lts.

Judgment reversed and judgment ordered for appellant, with costs.

Bushnell Stevens, appellant, agt. John Hauser, respondent.
 Lewis F. Allen, resp't, agt. The Commissioners of the Land Office, app'lts.

Order of general term affirmed and judgment absolute for appellant for \$860, with interest from June 4, 1858, with costs.

John S. Fake, app'lt, agt. Jonathan E. Whipple and Isaac T. Grant, resp'ts.

Judgment affirmed with costs and ten per cent damages.

Catharine N. Forrest, respondent, agt. Charles G. Havens and Joseph H. Goodwin, appellants.

Writ of error dismissed.

The People of the State of New York, defendants in error, agt. Thomas Paige, plaintiff in error.

Decisions Court Appeals

Judgment affirmed and judgment absolute for plaintiff, with costs.

Thomas W. Olcott, respondent, agt. Thomas B. Carrol, appellant.

Order appealed from reversed and judgment for the appellant on verdict, with costs.

Aaron Bissell, appellant, agt. Charles Balcom, respondent.

Order of general term affirmed without costs.

The People ex rel. Thomas Kearney, respondent, agt. James A. Bell, as auditor
&c., appellant.

Order of general term affirmed with costs.

Josiah Meyer, respondent, agt. Peter B. Meyer, appellant.

Ex. H. H. P.
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